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BENTHAMISM IN ENGLAND AND AMERICA

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The main purpose of this paper is not so much to measure the impact of utilitarianism on American political thought as to explain why utilitarian influence was so slight. The question I am seeking to answer may be phrased as follows: How did it come about that utilitarianism, the main current in English thought for two or three generations, was little more than a series of ripples, or at most a weak cross-current, on this side of the Atlantic? The problem becomes more puzzling when one reflects that the period of the rise and growth of utilitarianism in England (the first three or four decades of the nineteenth century) was an era in which intellectual relations between the two countries were especially close and one in which movements of political and social reform ran parallel courses. Quite reasonably, too, one might suppose that the qualities of Bentham's thought which contributed to its spread in England would have insured its enthusiastic reception here. A doctrine which contemptuously rejected tradition, preached hard-headed, calculating practicality, conceived of the individual as an isolated atomistic unit, and which in all its aspects and phases appealed to the virtues and limitations of the middle-class man of affairs—such a doctrine, one might think, would have flourished on nineteenth-century American soil.

As preliminary to a direct attack on the problem, some definitions or distinctions are in order. "When I mention religion," said Parson Thwackum, "I mean the Christian religion; and not only the Christian religion, but the Protestant religion; and not only the Protestant religion, but the Church of England." Likewise, when I mention utilitarianism, I mean Benthamism; and not only Benthamism, but crude Benthamism; and not only crude Benthamism, but that part of it which opposes to natural law and natural rights the principle of utility or greatest happiness. To be more explicit, in distinguishing between utilitarianism and Benthamism, I am excluding from consideration the influence upon American thought (which was no doubt very marked) of such utilitarian treatises as Paley's *Moral and Political Philosophy*. Nor is it part of my purpose to analyze the relation to American theory of that refinement or adulteration of crude Benthamism represented by the writings of John Stuart Mill. My discussion of Bentham's theory of rights will, however, necessitate some reference to John Austin's treatises on jurisprudence.

Still by way of introduction, it is necessary to touch briefly on the development of Bentham's concepts of natural law and natural rights. I say "development"; but, speaking strictly, there was only a series of restatements, covering a period of more than half a century, of the doctrine set forth in the *Fragment on Government* (1776). The character of Bentham's thought as a whole, to be sure, underwent important modifications. Thus until about 1808 he was much more interested in legal and penal reform than in political theory; and despite his association with Lord Lansdowne and other Whig leaders, he remained a Tory in politics. In 1808, as a result of the Panopticon fiasco and of his association with James Mill, he turned his attention to political questions; and within two or three years he became a champion of parliamentary reform, universal suffrage, and radical republican democracy.[1] It may be added that he also became an admiring student of what he called the "United States representative democracy." But although he thus came to accept the program, he persisted to the end in his rejection of the principles of the exponents of natural rights. If, as John Morley said, Burke changed his front but never changed his ground, of Bentham it might truly be remarked that he changed his ground but did not change his front.

In order to document this remark and to provide a background for my main thesis, I must deal, however briefly, with the complicated and wearisome topic of Benthamite bibliography.[2] Although

[1] See Élie Halévy, *The Growth of Philosophical Radicalism*, English translation by Mary Morris (New York, 1928), pp. 251–264.

[2] See Halévy, *op. cit.*, pp. 522–545 (annotated bibliography by C. W. Everett), and Leslie Stephen, *The English Utilitarians* (3 vols., London, 1900), Vol. 1, pp. 319–326.

Bentham was a constant and indefatigable writer, he published (or others published for him) spasmodically, belatedly, and bilingually —a fact not wholly without bearing on the nature of his influence here and elsewhere. In the first and most readable of his productions (published anonymously), the famous *Fragment*, he grounded his criticism of Blackstone on the utility or greatest-happiness principle, rejected natural rights by implication, and expressly rejected the law of nature as "an abuse of language."[3] Once its authorship was disclosed, the *Fragment* gave Bentham a temporary fame in his own country, and won him influential friends; but it seems to have been almost entirely ignored on this side of the ocean. Certainly it did nothing to lessen the tremendous vogue of the *Commentaries* here; and I find no reference to it in American political literature prior to 1873. "For the philosophy of law," wrote Oliver Wendell Holmes, Jr., in that year, "the *Fragment on Government* and Austin's lecture are worth the whole *corpus*" [of Roman law!][4] The *Introduction to the Principles of Morals and Legislation* (printed in 1780, but not published until 1789) made no great splash on either side of the water. Some years after its publication, one American Benthamite said that not four of his countrymen had read it.[5] The treatise was a systematic presentation of the doctrine of utility, and was concluded with a long footnote (and a footnote on the footnote!) in refutation of the American theory of natural rights as embodied in the Declaration of Independence and the Bills of Rights. "Who can help lamenting," asked the author, "that so rational a cause should be rested upon reasons so much fitter to beget objections than to remove them?"[6]

The nature of these objections he expounded in detail in the *Anarchical Fallacies*, written in 1791 as a commentary on the Declaration of the Rights of Man, but not published in French until 1816 and in English until a quarter of a century later.[7] Talk about natural rights, he exclaimed, is bawling upon paper."[8] Such talk is at once illogical and mischievous: illogical, because all rights are the creatures of government; mischievous, because its object is "to add to those [selfish and dissocial] passions already but too strong —to burst the bonds that hold them in—to say to the selfish passions, there, everywhere is your prey!—to the angry passions, there, everywhere, is your enemy!"[9] "Natural rights," so the famous passage runs, "is simple nonsense; natural and imprescriptible rights, nonsense upon stilts . . . ."[10] "From real laws, "Bentham adds, "come real rights; but from imaginary laws, laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters, 'gorgons and chimaeras dire.'"[11] Again, in the *Traités de législation* (1802), in Dumont's lucid French, he denounced natural rights as the creatures of natural law, as a "metaphor which derives its origin from another metaphor," and as "the most terrible destroyer of governments."[12] Dumont, who edited, translated, and published this treatise, sent a copy of it to his old schoolmate in Geneva, Albert Gallatin; and we know that it was read by several other Americans within a few years of its publication.[13] The bulk of it was not translated into English, however, until 1840—and then by an American, Richard Hildreth, whom we shall shortly discuss.

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[3] The *Fragment* forms pp. 221–295 of Vol. 1 of J. Bowring (ed.), *Works of Jeremy Bentham* (11 vols., Edinburgh, 1838–1843).

[4] In *American Law Review*, Vol. 7 (1873), p. 579—reprinted in Harry C. Shriver (ed.), *Justice Oliver Wendell Holmes—His Book Notices, Uncollected Letters, and Papers* (New York, 1936), pp. 34–35. On the popularity of the *Commentaries*, see Julian S. Waterman, "Thomas Jefferson and Blackstone's *Commentaries*," *Illinois Law Review*, Vol. 27, pp. 629–659 (Feb., 1933). I owe this latter reference to Professor C. B. Robson, of the University of North Carolina.

[5] "Burr said he knew not four persons in America who had read the *Principles*." Dumont to Bentham, September 4, 1811. *Works of Jeremy Bentham*, Vol. 10, p. 463.

[6] *Works*, Vol. 1, p. 154.

Up to this point, as we have seen, Bentham was a Tory; but after he became the leader of the philosophical radicals he persisted in his denunciation of natural rights. Thus in his *Plan of Parliamentary Reform* (1817), while accepting the conclusions, he attacked the premises of the Duke of Richmond's case for universal suffrage. "Some *ipse-dixitism* in it about rights might, in point of reasoning, though not perhaps in point of power of persuasion, have been spared."[14] Again, in a letter to Bowring, written in 1827, he referred to the Declaration of Independence as a "hodge-podge of confusion and absurdity";[15] and in the *Constitutional Code* (1830), he dismissed bills of rights as useful only as a check upon non-democratic governments, and rejected limitations on "legislative omnicompetence" as "in contradiction to the greatest happiness principle."[16] To this dreary catalogue, already too long, it must be added that Austin's *Province of Jurisprudence Determined* (1832), the dullest book Lord Melbourne ever read, made as little impression here as in England, and that his theory attracted little attention until the publication, posthumously, in 1863, of the *Lectures on Jurisprudence*. Finally, it is to be noted that many of Bentham's writings, including some of those mentioned above, did not appear in English until the publication, a decade after his death, of Bowring's edition of the *Works*. How extensively these formidable and carelessly edited tomes were purchased and read in the United States, I cannot say; but it may be worthy of note that I find no review of them in an American periodical until some twenty years after their publication—and that it was unfavorable in the extreme.[17]

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[7] *Tactique des Assemblés législatives, suivie d'un traité des sophismes politiques* (ed. Dumont, 2 vols., Geneva, 1816); *Works*, Vol. 2, pp. 489–534.

[8] *Works*, Vol. 2, p. 497. [9] *Ibid.*, p. 497.

[10] *Ibid.*, p. 501. [11] *Ibid.*, p. 523.

[12] *Traités de législation* (2nd ed., 3 vols., Paris, 1820), Vol. 1, pp. 128 and 129.

[13] See discussion and references below.

[14] *Works*, Vol. 3, p. 446. [15] *Ibid.*, Vol. 10, p. 63.

From the foregoing it is fair to infer that such of Bentham's writings as were known in this country by about 1860 were not in themselves capable of arousing and sustaining widespread interest in utilitarian doctrine. There were, indeed, several obstacles in the way of its spread. One was an *odium theologicum;* there were rumors that Bentham was an atheist. Frequently accompanying this accusation was the charge that some of his disciples, notably Francis Place, were preaching infanticide.[18] The most serious obstacle, however, was Bentham's style. "We could have wished," wrote Thomas Cooper (an otherwise friendly critic) in a review of the *Rationale of Judicial Evidence*, "that the present editor [young John Stuart Mill] had translated the work out of the obscure, involuted Bentham dialect in which it is written. A book more disgustingly affected and so nearly unintelligible it is not possible to imagine, with the exception of some of Mr. Bentham's former works, which equally exhibit specimens of what may, by courtesy to Mr. Bentham, be called English, but on no other score."[19]

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[16] *Ibid.*, Vol. 9, p. 119.

[17] "Jeremy Bentham and His Theory of Legislation," *National Quarterly Review*, Vol. 3, pp. 51–71 (June, 1861).

[18] See John Neal, *Principles of Legislation* . . . (Boston, 1830), p. iv (Bentham's theology) and p. 120 ff. (with particular reference to Francis Place's handbills on birth control); and Hugh Swinton Legaré, "Jeremy Bentham and the Utilitarians," *Southern Review*, Vol. 7, pp. 261–296 (Aug., 1831).

[19] *Southern Review*, Vol. 5, pp. 381–426 (May, 1830), at p. 381. Cf. C. W. Everett,

It is therefore clear that only authoritative and influential supporters, able expositors and translators, could propagate Benthamism in this country; and to account for the failure of the doctrine to deflect the course of American thought, I want to suggest, in the first place, that Bentham was as unfortunate in his American as he was fortunate in his English disciples. Halévy instances Bentham's chance meeting with Dumont at Bowood Castle in 1788 as "a typical case revealing the influence on history of little causes and individual accidents";[20] and one might similarly characterize the meeting with James Mill some two decades later. Such "causes and accidents," it may be repeated, were unfavorable to the diffusion of Benthamism in America. In evidence, let us call the roll of the American Benthamites. It will not take long.

The first of these was Aaron Burr. It is uncertain when Burr became and how long he remained a Benthamite, and it is doubtful whether he was ever a genuine believer. We do know that he owned the *Introduction;* and it is recorded that in 1793 he passed on his copy of it to Albert Gallatin with the remark "Here, this will please you—it is too dry for me!"[21] In 1808, Burr met Dumont in London, assured him that he had read the *Introduction* and the *Usury*, and added that "in spite of his recommendation they were little read in America, where anything requiring studious application is neglected. Nobody but Gallatin felt all their merit; and Gallatin was the best head in the United States."

On the strength of this, Dumont urged Bentham to meet the American, adding: "You may tell me his duel with Hamilton was a savage affair, but he has no desire to break your head."[22] Thus announced, Burr readily ingratiated himself with Bentham, and lived with (or sponged off) the old man for several months. "I am going to dine with Jeremy Bentham and Colonel Burr," wrote a contemporary, "and am very curious to see what sort of mixture will result from putting together pure philosophy and Yankee

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Introduction, *Anti-Senatica: An Attack on the United States Senate, sent by Jeremy Bentham to Andrew Jackson*, in *Smith College Studies in History*, Vol. 11, pp. 209–267 (July, 1926), at p. 220: "His [Bentham's] later works are generally consulted only by the determined scholar who will bear with the form for the matter. . . . Whether Bentham's direct pamphleteering had any effect on America, it is impossible to say without research, but the *Anti-Senatica* gives some indication as to why it probably did not."

[20] *Op. cit.*, p. 75.

[21] Neal, *op. cit.*, p. 111.

[22] *Works*, Vol. 10, p. 433.

treason."[23] One result was that for a time Bentham seriously entertained the idea of emigrating to Mexico, there to serve as lawgiver in the imperial domain of Emperor Aaron I.[24] Another was that Burr made at least one convert to Benthamism, his own daughter. To Theodosia he sent all of Bentham's published works and a bust of the philosopher,[25] and in acknowledgment of receipt of the bulky package, she wrote as follows: "I have read a small part of the *Traités de législation.* The work is highly original. It is truly calculated to make readers think profoundly, and gives a new direction to their reflections. Jeremy Bentham has opened a new and deeper vein of political and moral science, to bring from it the most brilliant diamonds. Such a mind as his is not produced in many centuries. I imagine he has reached the *ne plus ultra,* the border of the Styx, and no one can go further without becoming an inhabitant of the other world. . . . I should take as much pride in being his translator as the ancients did in declaring themselves oracles of their gods."[26]

Whether Burr's intellectual and glamourous daughter maintained such a worshipful attitude for the few remaining years of her life, I cannot say. Burr himself, while on his Continental travels, set down in his journal a critical comment relative to a French treatise on natural law: "Petty and ingenious nonsense . . . not naming Bentham," he wrote.[27] On his return to England in 1811, he took part in the Benthamite campaign to spread the Lancasterian system of education.[28] There is no evidence that on his return to his native land the following year he made any attempt to diffuse utilitarian doctrine, and it goes without saying that he was not of the stuff of which the Mills were made.

There were, however, other Benthamites. Mention has already been made of Gallatin, who also planned, but never executed, a translation of one of Dumont's redactions.[29] Edward Livingston, the Louisiana lawgiver, avowed himself a disciple, corresponded with the master, and in the introduction to the famous Louisiana penal code paid tribute to the principle of utility; but he seems to have been unaffected by Bentham's political doctrine and himself made no contribution to political theory.[30] Thomas Cooper became a utilitarian of a sort as early as 1812; and in 1826, in the *Elements of Political Economy*, he rejected both natural rights and natural law. "All rights are the creatures of society; founded on their real or supposed utility, and requiring the force of society to protect them. . . . There is no such thing as law of nature or law of nations existing."[31] In the review previously referred to, he praised the substance, even as he deplored the style, of the *Rationale;* and in his 1832 "Introductory Lecture to a Course of Law" he declared: "The polar star of morals and law is the greatest happiness of the greatest number."[32] But he did not live to develop the doctrine or found a school, and in any case his use of the greatest-happiness principle to vindicate slavery would have prevented him from exerting a truly national influence.

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[23] F. Horner, *Memoirs and Correspondence*, Vol. 1, p. 464. (letter dated October 27, 1808), quoted in Élie Halévy, *La Formation du radicalisme philosophique* (3 vols., Paris, 1901–1904), Vol. 2, p. 364. The English translation of this work, previously cited, does not contain the extensive footnote references in which the passage quoted above will be found.

[24] *Works*, Vol. 10, p. 439.

[25] Samuel H. Wendell and Meade Minnegerode, *Aaron Burr* (2 vols., New York and London, 1925), Vol. 2, p. 240.

[26] Matthew L. Davis (ed.), *The Private Journal of Aaron Burr* (2 vols., New York, 1838), Vol. 1, p. 114.

[27] *Ibid.*, p. 231.

[28] Halévy, *La formation du radicalisme philosophique*, Vol. 2, p. 364.

Our next Benthamite is one who, like Burr, was privileged to draw his inspiration from the lips of the master himself; one might call him a Down-East Yankee at the court of King Jeremy. In 1824, John Neal of Portland, Maine, went to England to make his fortune. He had already won some reputation as a novelist and, what is to the point here, had read some of Bentham's treatises.

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[29] *Works of Jeremy Bentham*, Vol. 3, p. 468.

[30] For the brief reference to the utility principle, see *Complete Works of Edward Livingston on Criminal Jurisprudence* (2 vols., New York, 1873), Vol. 1, p. 189. On Livingston's indebtedness to Bentham, see Jesse S. Reeves, "Jeremy Bentham and American Jurisprudence," *Report . . . State Bar Association of Indiana* (1906), pp. 212–237; C. W. Everett, *op. cit.* (introduction to *Anti-Senatica*); Paul Brosman, "Edward Livingston and Spousal Testimony in Louisiana," *Tulane Law Review*, Vol. 11, pp. 243–265 (Feb., 1937); Mitchell Franklin, "Concerning the Historic Importance of Edward Livingston," *ibid.*, pp. 163–212; Roscoe Pound, *The Formative Era of American Law* (Boston, 1938), especially pp. 16, 167. The lectures constituting Dean Pound's book "were delivered at the law school of Tulane University on the occasion of the centennial of the death of Edward Livingston."

[31] *Elements of Political Economy* (Columbia, 1826), pp. 52–53. See B. F. Wright, Jr., *American Interpretations of Natural Law* (Cambridge, 1931), pp. 308–310; and Maurice Kelley, "Additional Chapters on Thomas Cooper, *University of Maine Studies*, 2nd series, No. 15 (Orono, 1930), pp. 5–100, especially p. 80.

[32] Quoted in Dumas Malone, *Public Life of Thomas Cooper* (New Haven, 1926), p. 370.

Indeed he had offered to translate one of the Dumont redactions; but the American publisher refused, "alleging that no one knew Mr. Bentham."[33] Living in London as a free-lance contributor to the English reviews, Neal attended one of the meetings of the Utilitarian Club, and in that way made Bentham's acquaintance. For a year and a half he resided at Queen's Square Place with the aged Bentham, and on his return to America announced himself as his spokesman. As such, he published in 1830 *The Principles of Legislation,* a translation of the first fourteen chapters of the *Traités.* To it he prefixed a long introduction, containing a biography and a bibliography of Bentham, together with a statement of his own political theory. "I acknowledge," he proclaimed, "no rights that can interfere with the *greatest happiness of the greatest number*—none whatever—not even that of 'life, liberty, and the pursuit of happiness'—to borrow the awkward and either very unmeaning or very untrue phraseology of most of our constitutions. If it be better for the happiness of the greatest number that a man should die—*cut him down without mercy.* And so with his liberty, and so with his property."[34] That same year he wrote to inform Bentham that he had become a father and to promise that "my child, being born a utilitarian, shall, if I can so manage it, become the mother of nations in the faith."[35] His own faith did not long survive the failure of his book. The translation was awkward and inaccurate, and only four hundred copies of it were sold.[36]

Bentham was likewise unfortunate in his last American disciple and translator, Richard Hildreth. His translation of the *Traités* was, unlike Neal's, a thorough and competent job;[37] and in the introduction he enthusiastically confessed the faith that was in him. "In the moral sciences, and especially in legislation," he wrote, "the principle of utility is the only certain guide; and in the estimation of an impartial posterity, Bentham will rank with Bacon, as an original genius of the first order."[38] But Hildreth's subsequent attempts to present an American version of Benthamism, *The Theory of Morals* (1844), in which he explicitly rejected natural rights, and the *Theory of Politics* (1853), in which he identified might with right, were little noticed at the time and have since been entirely forgotten.[39] "He seems to have had too little originality in ideas or style," Professor K. B. Murdock has written, "to win for himself a great place in history, and his reputation is likely to remain simply that of an active editor and writer whose competence in historical craftsmanship saved him from oblivion."[40]

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[33] John Neal, *Principles of Legislation: From the Ms. of Jeremy Bentham . . . by M. Dumont, Translated from the Second Corrected and Enlarged Edition; with Notes and a Biographical Notice.* (Boston, 1830), p. 43. On Neal, see Milton Ellis's account in the *Dictionary of American Biography* and Irving T. Richards, *Life and Works of John Neal* (unpublished thesis, Harvard University, 1932).

[34] *Op. cit.*, p. 120. The italics are in the original.

[35] Letter to Bentham, Mar. 11, 1830, in Richards, *op. cit.*, Appendix B.

[36] *Ibid.*, p. 744.

[37] *Theory of Legislation by Jeremy Bentham translated from the French of Étienne Dumont* (Boston, 1840).

Some reference should be made, finally, to E. L. Godkin, who, as editor of the *Nation* and as the author of several collections of political essays, exerted no little influence on American thought. "When I was at college (Queen's at Belfast)," he wrote, "I and the young men of my acquaintance were liberals in the English sense. John Stuart Mill was our prophet, and Grote and Bentham were our daily food. In fact . . . our professor of political economy and jurisprudence made Bentham his textbook."[41] In 1865 (having resided in this country nearly a decade), in a letter to Charles Eliot Norton, he argued in the Benthamite manner against the theory of natural rights as a justification of Negro suffrage; but he was soon to lose his utilitarian faith.[42] Some years later, in an essay on John Stuart Mill, he characterized Bentham as devoid of imagination and sympathy, and Mill as deficient in imagination and "animal spirits." Interestingly, too, he remarked that Bentham's influence in social theory, as distinguished from that in the realm of legal reform, was narrowed for want of an interpreter, "none of his followers having attempted to put his wisdom into readable shape, except Dumont, and he only partially, and in French."[43]

[38] *Op. cit.*, p. iii.

[39] *Theory of Morals* (Boston, 1844), pp. 183–184; *Theory of Politics* (New York, 1853), p. 20. With respect to the influence of Benthamism on Hildreth, see A. M. Schlesinger, Jr., "The Problem of Richard Hildreth," *New England Quarterly*, Vol. 13, pp. 223–245 (June, 1940); and on his place in American political thought, see Wright, *op. cit.*, p. 267.

[40] In article on Hildreth in *Dictionary of American Biography*.

[41] Rollo Ogden (ed.), *Life and Letters of Edwin Lawrence Godkin* (2 vols., New York, 1907), Vol. 1, p. 11.

[42] *Ibid.*, pp. 45–49.

[43] *Reflections and Comments* (New York, 1895), pp. 70–71. A good discussion of Godkin's political theory and of its relation to Bentham and Mill will be found in Vernon L. Parrington's *Main Currents in American Thought*, Vol. 3 (New York, 1930), pp. 154–168.

So it appears that the American Benthamites were either epigoni or (as in the case of the last-named) apostates. It is also worthy of note that they worked alone. They founded no Utilitarian Club; they established no *Westminster Review*. Consequently, it is not surprising that they made but few conversions to the faith.

To survey this whole matter of Benthamism in America from another aspect, we might do well to pass in brief review the reactions to Benthamite theory on the part of more representative thinkers, moral and political—men who were in the main currents of American thought. To begin with a reference to Emerson: in 1831 he wrote in his journal: "The stinking philosophy of the utilitarian! *Nihil magnificum, nihil generosum sapit,* as Cicero said of that of Epicurus."[44] Two years later, however (a year after Bentham's death), he wrote to his brother from London: "I have been to see Dr. Bowring, who was very courteous. He carried me to Bentham's house and showed me with great veneration the garden walk, the sitting room, and the bed chamber of the philosopher. He also gave me a lock of his gray hair, and an autograph. . . . He is anxious that Bentham should be admired and loved in America."[45] Emerson contributed nothing to that end. He rejected utilitarianism with the same contempt as did his friend Carlyle, by whose views on this subject he was greatly influenced. In 1836, he wrote: "I had rather not understand in God's world than understand thro' and thro' in Bentham's."[46]

An equally scornful view of Benthamism is reflected in the writings of Hugh Swinton Legaré. "We do not know whether the publication of this book," he wrote in a long review of John Neal's *Principles,* "is to be considered as any proof of the growing popularity of Bentham and utilitarianism. But sure we are . . . that it will do nothing to increase that popularity."[47] After contrasting Bentham's principle of utility unfavorably with that of Paley, he concluded as follows: "But enough of utilitarianism—a philosophy the very reverse of that so justly, as well as beautifully, described in Milton's *Comus*:

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[44] Edward Waldo Emerson and Waldo Emerson Forbes (eds.), *Journals of Ralph Waldo Emerson* (10 vols., Boston and New York, 1909–1914), Vol. 2, p. 455.

[45] Ralph L. Rusk (ed.), *Letters of Ralph Waldo Emerson* (6 vols., New York, 1939), Vol. 1, p. 392. [46] *Ibid.*, Vol. 1, p. 450.

[47] *Writings of Hugh Swinton Legaré* (2 vols., Charleston, 1845), Vol. 2, p. 449. The essay first appeared in the *Southern Review* as cited above. On Legaré's importance in the development of American thought, see Parrington, *op. cit.*, Vol. 2, pp. 114–124.

> 'How charming is divine philosophy
> Not harsh and crabbed as dull fools suppose. . . .' "[48]

During the course of his pilgrim's progress, Orestes A. Brownson took up many of the popular doctrines of his time, but he consistently ridiculed Benthamism. In particular, he repudiated the democracy of "the greatest good of the greatest number, as taught by that grave and elaborate humbug, Jeremy Bentham."[49] "Hildreth," he wrote in a review of the *Theory of Morals*, "has studied Benthamism until his own head is more confused, if possible, than ever was Bentham's own head."[50]

Likewise, if one surveys the controversial writings and the systematic political treatises of the first six or seven decades of the nineteenth century, one finds that the leaders of thought were untouched by or were unfriendly to Benthamism. John Adams, Jefferson, John Taylor, Madison, Calhoun—none of these seems to have known Bentham's contributions to political theory.[51] Nathaniel Chipman's *Principles of Government* (1833) shows some utilitarian influence, but it is the utilitarianism, not of Bentham, but of Paley.[52] Lieber makes one reference to Bentham in the *Political Ethics*, and relegates him to a footnote in the *Civil Liberty*.[53] Woolsey curtly rejects the greatest happiness principle, and dismisses the Austinian concept of rights as "a gloomy system."[54]

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[48] *Ibid.*, p. 481.

[49] Brownson's *Works* (20 vols., Detroit, 1882–1887), Vol. 20, p. 354. The best biography is Arthur M. Schlesinger, Jr., *Orestes A. Brownson: A Pilgrim's Progress* (Boston, 1939).

[50] *Ibid.*, Vol. 14, p. 237.

[51] "Neither his readings in theology nor his later acquaintance with the critical work of Bentham seems to have shaken his confidence [in Locke's theory of natural rights]." Abbot E. Smith, *James Madison, Builder* (New York, 1937), p. 95. For the Bentham-Madison correspondence growing out of Bentham's offer to codify American law, see *Works of Jeremy Bentham*, Vol. 4, pp. 453–507; G. Hunt (ed.), *Writings of James Madison* (New York, 1900–1910), Vol. 8, p. 400; and Charles Francis Adams (ed.), *Memoirs of John Quincy Adams* (12 vols., Philadelphia, 1874–1877), Vol. 3, pp. 511–512. On Jefferson's lack of familiarity with Bentham's writings, see Julian S. Waterman, *loc. cit.*, p. 648.

[52] *Principles of Government: A Treatise on Free Institutions* (Burlington, 1833), especially pp. 85 and 96.

[53] *Political Ethics* (2 vols., Boston, 1838), Vol. 1, p. 356; *On Civil Liberty and Self-Government* (enlarged ed., Philadelphia, 1859), p. 195.

[54] T. D. Woolsey, *Political Science* (2nd ed., New York, 1889), pp. 1–2 (happiness principle) and p. 130 (Austinianism).

In the last two or three decades of the century, to be sure, there emerged what Professor Dicey would call a Benthamite cross-current in American juristic and political thought. Oliver Wendell Holmes, Jr., was one of the first to subject Austinianism to critical analysis; and although he did not follow the doctrine of sovereignty all the way, he did accept, and he continued to adhere to, the Austinian concept of rights and of natural law.[55] A. Lawrence Lowell, writing in 1897, on "The Limits of Sovereignty," declared that "it is due to Austin, more than any one else, with the possible exception of Bentham, that the idea [of natural rights] has fallen into discredit, and has been abandoned by almost every scholar in England and America."[56] This was no doubt an exaggeration, even in respect of the prevalence of Austinianism among scholars; certainly it is not true that the main current of political thought was Benthamite or Austinian. In this connection, the analysis of W. W. Willoughby is of interest. In his *Nature of the State* (1896), he substituted utility for natural rights "as the positive basis upon which the state rests."[57] He went on to say, however, very cogently as it seems to me, that "resting, as we do, our origin upon a forcible separation from England, and founding the justification for our acts upon so-called natural or unalienable rights of liberty, we have not been disposed to see in legal authority the sole source of legal rights, nor to concede to its sovereignty such a legally despotic character as logically follows from the Austinian view."[58]

The passage just quoted suggests another and no doubt a more basic reason for the failure of Benthamism to become a main current in American thought. Halévy has acutely observed that Bentham's influence outside his own land was greatest in such countries or areas as Russia, Spain, and Spanish America, and that it was least in nations which like France and Germany had a "philosophic tradition."[59] Extending this generalization to include the United

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[55] Cf. note 4 above; and see "Codes and the Arrangement of Law," *American Law Review*, Vol. 5, p. 1 (1870), reprinted in *Harvard Law Review*, Vol. 44, pp. 725–737 (Mar., 1931); "Natural Law," in *Collected Legal Papers* (London, 1920), especially pp. 313–314; and cf. the statement by Judge Learned Hand: "Nor again do I suppose that I am asked to discuss . . . his [Holmes's] understanding of law, so strictly Austinian . . ." F. Frankfurter (ed.), *Mr. Justice Holmes* (New York, 1931), p. 127—quoted in Mark DeWolfe Howe (ed.), *Holmes-Pollock Letters* (2 vols., Cambridge, 1941), Vol. 2, p. 263, n. 2.

[56] *Essays on Government* (Boston, 1897), p. 193.

[57] *Op. cit.* (New York, 1896), p. 113. [58] *Ibid.*, p. 166.

[59] *Growth of Philosophical Radicalism*, p. 296.

States, one might reasonably suppose that even if Bentham had been more fortunate in his American interpreters, his doctrine would have encountered an immovable obstacle in our deep-seated Lockean tradition. A more detailed and (I hope) more convincing analysis would run somewhat as follows: In respect of the future of Benthamism, the decisive period in both countries was that between the French Revolution and (say) 1815. In England, to abridge a long story, the reaction to the French Revolution was so strong and so enduring that no doctrine at all tainted with Jacobinism could win widespread acceptance. By 1815, however, there was a demand, as Professor Carl Becker has put it, for "a distinctively British road to democracy"; and Bentham pointed the way.[60] "The teacher who could lead England in the path of reform must not talk of the social contract, of natural rights, or rights of man, or of liberty, fraternity, and equality. Bentham and his disciples precisely satisfied this requirement." Thus Professor Dicey.[61]

In the United States, on the other hand, the reaction to the French Revolution was not so extreme.[62] There were, to be sure, bitter attacks on Paine and the Jacobins; but only one "tie-wig" Federalist, Fisher Ames, repudiated the natural law concept.[63] The case of John Quincy Adams is particularly interesting. In his *Letters of Publicola* (1791), he attacked Paine and the French Revolution without himself abandoning the natural rights heritage of our own Revolution. Years later, as American minister in London, he became an intimate friend of Bentham and accompanied the aged philosopher on the famous "antejentacular and post-prandial circumgyrations."[64] To the end, however, he retained his faith in the philosophy of natural rights. "The theory of the rights of man," he wrote in 1835, "has taken deep root in the soil of civil society. It has allied itself with the feelings of humanity and the precepts of Christian benevolence. . . . It has linked itself with religious doctrines and religious fervor."[65]

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[60] *Declaration of Independence* (New York, 1922), p. 296.

[61] *Lectures on the Relation between Law and Public Opinion in England* (2nd. ed., London, 1914), p. 171.

[62] See C. D. Hazen, *Contemporary American Opinion of the French Revolution* (Baltimore, 1897).

[63] Wright, *op. cit.*, p. 138.

[64] C. F. Adams (ed.), *Memoirs of John Quincy Adams* (10 vols., Philadelphia, 1874–1877), Vol. 3, pp. 511–512, 537–555, 560–565. See also the letter from Bentham to Adams, *Works of Jeremy Bentham*, Vol. 10, pp. 554–555.

[65] *Memoirs*, Vol. 9, p. 251; quoted, Wright, *op. cit.*, p. 211. Illuminating discussion of the religious basis of the natural rights doctrine as a reason for its per-

In this country, then, although the natural rights concept has not been a continuously vital and active element in our political thought, it has always been a viable one. Indeed, one can go further and say that here it was utilitarianism which became discredited by the use to which it was put in the great political debates of the nineteenth century. Thus in the state convention debates of the twenties and thirties, some opponents of the extension of the franchise opposed the democratic natural rights argument with a case grounded on utilitarian principles. P. P. Barbour, for example, in the Virginia convention (1829–1830) argued in this fashion: "Is it not a solecism to say that rights, which have their very being as a consequence of government, are to be controlled by principles applying solely to a state of things when there was not government?"[66] "In politics, as in morals," he went on to say, "the best test of propriety is practical utility."[67] Also in the slavery controversy, anti-slavery arguments premised on natural rights were sometimes countered by appeals to the principle of utility. Cooper's utilitarian defense of slavery has been mentioned. To take another example, James Henry Hammond, repudiating natural law, based slavery "on the revealed Will of God—on custom—on utility—on the happiness of the greatest number. . . ."[68] Thus, by a curious twist in the course of thought, a doctrine which in England was on the side of the future was here discredited by its association with the forces of reaction.

A third reason for the failure of Benthamism to make a strong impact on American political thought deserves brief notice. I have previously had occasion to point out that in his second or radical phase Bentham became an admirer of the American constitutional system, and I may add that his admiration was genuine and uncritical. In his *Leading Principles of a Constitutional Code* (1823), for example, he wrote: "This [the United States] Constitution has for its general end the greatest happiness of the greatest number."[69] England, he argued in the *Constitutional Code* (1830), has no con-

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durance in American thought will be found in Alice M. Baldwin's *New England Clergy and the American Revolution* (Durham, 1928).

[66] *Virginia Convention: Proceedings and Debates* (Richmond, 1830), p. 91.

[67] *Ibid.*, p. 94.

[68] Quoted, William Sumner Jenkins, *Pro-Slavery Thought in the Old South* (Chapel Hill, 1935), p. 44.

[69] *Works*, Vol. 2, p. 269. A little further on (p. 274), he qualifies his praise: "slave-purchasing and pertinaceously slave-holding states always excepted."

stitution. "The Anglo-American United States" has a constitution. "It has for object the greatest happiness of the greatest number."[70] He wrote to President Andrew Jackson in 1830 that he was at heart more of a United States man than an Englishman."[71] The point is, of course, as Professor A. M. Schlesinger has observed, that "many of the ideals of political democracy for which Bentham strove were already incorporated in the form of statutes and constitutions in the United States," and hence "it is not surprising that his doctrines were chiefly influential in America in the field of juristic science."[72] The point is, too, that in the context of such statements as those just quoted, his criticism of our natural rights philosophy and of our bills of rights might easily pass unnoticed.

In conclusion, one might, indeed, inquire whether Bentham's greatest-happiness or utility principle was essentially antithetical to the natural rights concept. To most nineteenth-century thinkers it seemed to be; but in perspective, as Ritchie was one of the first to point out, it appears to be merely a variant of it. When Bentham said (he seems never to have written), "Each to count for one and no one for more than one," he unwittingly accepted the basic assumption of the doctrine which he had so unremittingly attacked.[73]

This is not to say, however, that the failure of Benthamite doctrine to become a main current in American thought is altogether without significance. Dicey and more recently G. D. H. Cole have shown quite convincingly that although Bentham's was originally and, in a sense, accidentally an individualist doctrine, its essence, its inner logic, was collectivist. The greatest-happiness principle (following Dicey) was "big with revolution"; its implication was that legislation should respond to the interests of the wage-earning class, which in an industrial society constitutes the "greatest number." Furthermore, the utilitarian theory of sovereignty provided, in parliamentary supremacy, the instrument wherewith such legislation might be shaped. Finally, in its effective demand for a more efficient, more highly centralized, public administration, Benthamism laid the foundation of the modern service state.[74] To end on a speculative note, I think it at least arguable that widespread acceptance of the Benthamite brand of individualism in America might well have facilitated here, as in England, rapid transition to a collectivist democracy.

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[70] *Ibid.*, Vol. 9, p. 9.

[71] John Spencer Bassett (ed.), *Correspondence of Andrew Jackson* (5 vols., Washington, 1926–1931), Vol. 4, p. 46. I am unable to agree with Mr. C. W. Everett's statement (*op. cit.*, pp. 209–218) that Jackson's first message to Congress reflects Bentham's influence in phrasing or in substance. Everett suggests that Bentham's disciple and Jackson's secretary of state, Edward Livingston, may have written the message; but there is in any case no evidence of which I am aware that Livingston was acquainted with Bentham's political, as distinguished from his juristic, theory.

[72] Introduction (p. 5) to Hilda G. Lundeen, *The Influence of Jeremy Bentham on English Democratic Development* (University of Iowa Studies, Vol. 8, No. 3, no date).

[73] David G. Ritchie, *Natural Rights* (3d. ed., London, 1916), p. 249. See also Leslie Stephen, *op. cit.*, Vol. 1, pp. 303–310, for a penetrating comparative analysis of Benthamite and natural-rights individualism.

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[74] Dicey, *op. cit.*, pp. 303–310. Cf. G. D. H. Cole, *Some Relations between Political and Economic Theory* (London, 1934), pp. 45–46.

INDIVIDUAL CLAIMS TO SOCIAL BENEFITS, II*

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V. OFFICIALS WHO CONDUCT HEARINGS

Since officers who conduct hearings in benefit procedures are given so much latitude and are so free from any leading-strings of a court process, it is of the essence not only that they possess a judicial attitude of mind but that they be keenly alive to the social implications of their work. In 1929, the New York Industrial Survey Commission wrote: "Referees are in every essential judicial officers; and they should be, so far as is humanly possible, above suspicion of improper practices, political or otherwise. They should be persons of mature judgment and be skilled in law—not alone the Compensation law—for they touch many and various points of law not comprehended within the language of the Compensation law. They should be trained in the value of evidence, and they should know the rules of evidence even though they are not obliged to apply them in compensation hearings."[70]

It is safe to speculate that if the above had been written in 1941, it would have contained more emphasis on the social viewpoint needed by referees. They must realize that on them depends to a large extent the difficulties accompanying denial of benefits which not only may cause serious hardship to individuals but may even have repercussions of the utmost importance in the community at large. Thus referees conducting hearings are supposed to have a kind of partisanship toward the law, in that they must constantly remember that its aim is to secure payments to all qualified claimants, not merely to decide the merits of a dispute between two opposing parties. Nevertheless, an attitude which is supposed to resolve doubts in favor of a claimant as required by the compensation law does not negate a judicial frame of mind in deciding the merits of a disputed claim.

The best defense against unfairness and discrimination is found here, as in all administration, in the appointment of qualified personnel. The referees who conduct the hearings in workmen's compensation in New York are appointed by the industrial commissioner of the state, and so are not responsible for position or tenure to the industrial board which may later review their decisions.[71] No qualifications are established by law, save for a limited number of referees who are appointed under civil service. It has been suggested that the appointing power be lodged with the judiciary,[72] but the present trend is away from such proposals, which over-emphasize the legal nature of compensation work to the detriment of specialized knowledge, and would in no way lessen political pressures on the appointing authority. In unemployment compensation, New York has followed rather different lines, for the referees who hold the hearings for the determination of disputed claims in that type of compensation are likewise subject to appointment by the industrial commissioner, but are responsible to the unemployment insurance appeal board[73] for the conduct of hearings.[74] Their authority thus appears to be divided so that they are neither entirely part of the administrative organization of the state department of labor nor entirely part of an independent quasi-judicial organization. In view of the judicial nature of their duties, the latter would appear to be the more logical position for them to occupy in the state government.

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* The first instalment of this article appeared in the August issue.

[70] *Report of the Industrial Survey Commission,* Mar. 9, 1929, p. 58. Cf. *Hearings under the New York Workmen's Compensation Law,* pp. 20–24, for discussion of qualifications of referees.

Wisconsin followed an altogether different procedure in its first review of claims for unemployment compensation. There, appeals from the determination of the adjustments section may be made by either employer or employee within seven days from the date on which notice of the award was mailed to them. Appeals are heard in the first instance by appeal tribunals to which matters are referred by an appeals section in the central office of the unemployment compensation department of the industrial commission of the state. Appeal tribunals consist of from one to three full-time salaried members or of one full-time salaried examiner who serves as chairman and two others, representing respectively employers and employees, appointed by the commission, and paid on a *per diem* basis.[75] In practice, an appeal tribunal consists of a senior examiner assigned from the central office and employer and employee representatives selected by the commission from lists submitted for the particular group by the Wisconsin Manufacturers' Association and the Wisconsin Federation of Labor.[76] No person may serve in any case in which he is directly interested.[77] If one lay member does not appear at the hearing, it may be held with the consent of the parties, the lay member who is present participating but not voting.

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[71] The Industrial Board of five members is appointed by the governor to serve for overlapping terms of six years each.

[72] Cf. *Hearings, op. cit.*, pp. 22–24.

[73] The Unemployment Insurance Appeal Board is an independent body of three members appointed by the governor for overlapping terms of six years each. *Consolidated Laws of New York*, Ch. 31, Sec. 518.6.

[74] *Ibid.*, Sec. 533.1.

[75] *Laws of Wisconsin*, Ch. 108, Sec. 108.09(4).

After the receipt of an appeal request at the central office, the head of the appeals section schedules the time and place for a hearing. The senior examiner, as chairman of the appeal tribunal, directs the proceedings at the hearing and questions the parties and witnesses, although of course the other members may ask questions too. Each case is allowed an hour and a half and is treated informally, the parties usually not being represented by attorneys.[78] After the hearing, the case is discussed and the employer and employee members state their views. If they disagree, the examiner's vote decides the case, though occasionally decision is postponed for further discussion with other examiners. All cases are completely reported, but the notes are not transcribed unless needed for further appeal.

The advantages of the appeal tribunal plan appear to be: (1) It brings the viewpoints and experiences of employers and employees into a case. (2) It is valuable to have both of these groups represented whenever there is a contentious labor problem involved in the decision, such as the right to receive unemployment compensation by a person on strike. (3) In some cases, one of the members of the tribunal may have had personal experience in the industry concerned, which aids in bringing out relevant testimony and reaching a decision.

The objections to the plan, on the other hand, are the following: (1) The cost is high. As the compensation of the three members is at the rate of $10 per day plus expenses, the cost is usually about $50 per day. As the hearing is always held in the county where the employer's industrial establishment is located, all members hearing a case must be taken there, even if only one case is involved. (2) The lay members are frequently ignorant of the law, unless the same member serves frequently. (3) These same lay members are often not familiar with the procedure of hearing nor with weighing evidence.[79]

Partly to overcome these objections, the Wisconsin law was amended in June, 1937, to provide that, at the discretion of the industrial commission, an appeal tribunal may consist of only a senior examiner acting for the board.[80]

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[76] Matschek, *op. cit.*, p. 50 ff.

[77] Cf. note 75, *supra.*

[78] Matschek, *op. cit.*, p. 50.

[79] Matschek, *op. cit.*, p. 51.

If the main objective to be attained is fairness to individual claimants, hearings are best held by persons appointed specifically for the purpose, such as referees in workmen's compensation. If the hearings are intended, as in some old age assistance procedures, to be an integral part of the total supervisory effort of the state, arrangements for hearings must include participation by workers responsible for relations with the local administrative organizations. In Wisconsin, an interesting plan is followed, in that two state staff members who have no other responsibilities conduct the hearings in various parts of the state. These officials submit a summary report of each hearing, documented by a statement of the legal aspects of the case and by a complete stenographic record of the proceedings.[81] The state board is thus furnished with all the facts and opinions.

VI. REPRESENTATION OF CLAIMANTS

One of the advantages of the informality of administrative procedure in applications for social benefits has been the fact that claimants may be represented by persons of their choice and of specialized knowledge rather than merely by attorneys versed in the intricacies of legal procedure. Indeed, the present workmen's compensation procedure in New York State is in part the result of the misuse of the old employers' liability system by the practices of certain unscrupulous lawyers. Contingent fees, excessive charges, delays due to clogged court calendars, and the legalistic tone manifested by the technical rules of evidence, preponderance of evidence, statutory defenses, and all the armamentarium of the skilled lawyer[82] were among the reasons why the need for speedy, informal, and technical procedure in securing compensation for injured workers became so apparent in New York that the workmen's compensation law was enacted in the first instance.

Early abuses of the system of lay representation led to the adoption of licensing provisions. So-called "runners," persons not attorneys, represented themselves to injured workmen as able to secure benefit in the payment of compensation, and frequently exacted money improperly from the workmen. So safeguards were adopted and now form part of the law and regulations. Any one not a lawyer desirous of representing claimants before the referees or industrial board of New York must secure a license from the board.[83] Such licenses are issued only after presentation of credentials, examination, and personal appearance before a committee of the board, and are given to two groups of people only—first, those licensed without charge, who include trade union or welfare representatives retained on a salary basis by a union or other organization, or occasionally paid on a fee basis by an injured workman; second, those who desire to practice as individuals on payment of a license fee of fifty dollars per year.[84] Of course, attorneys may also represent claimants, and do not need licenses, but the financial rewards for representation in compensation cases are apt to be so small that busy lawyers are little likely to be attracted to this type of case.

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[80] *Wisconsin Laws*, Ch. 108, Sec. 108.09(4).

[81] Lansdale, etc., *op. cit.*, p. 312.

[82] Quoted from letter from Mr. Henry Sayer, *op. cit.* Cf. note 59 *supra.*

In an effort to safeguard workers, representatives of all kinds practicing before the referees or industrial board of the state of New York are limited in the amount of fee to be charged. Unless service is rendered without charge to the worker, a "nominal fee" is fixed at the hearing. If "substantial assistance" has been rendered, a fee is fixed "commensurate with the service, having due regard for the financial status of the claimant."[85] The experience of members of the bar regarding fees for services has been so unpleasant that, except in the most unusual cases, they are reluctant to appear.[86]

In a similar way, laymen as well as attorneys may represent claimants under the New York Unemployment Compensation Law, but only lawyers may charge for their services.[87] The local employment offices advise claimants by means of large signs telling them of their rights to a hearing and stating: "You do *not* need a lawyer." In such cases, union agents often represent the claimant, and these agents are often "more skillful and helpful" than attorneys[88] because of specialized knowledge of unemployment problems.

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[83] *Consolidated Laws of New York*, Ch. 75, Art. II, Secs. 24a, 50; Workmen's Compensation Law Rules and Regulations, Rules 20–21. [84] *Ibid.*

[85] Rule 17. In the case of attorneys, the "nominal fee" provision is omitted, and the fee is arranged only on a basis commensurate with the service and with regard to the financial status of the claimant. Some lawyers have tried to impose on compensation cases the old liability system of contingent fees. Cf. Matter of Fisch, 188 App. Div. 525.

[86] *Hearings, op. cit.*, p. 26. Cf. pp. 26–27 for discussion of fees in general.

[87] *Consolidated Laws of New York*, Ch. 31, Sec. 511.2. Cf. also Cloe, *op. cit.*, p. 1163, note 56, where it is stated that referees and the Appeal Board seldom inquire as to the fee arrangement with an appearing attorney, but claim reviewers do and when requested usually allow $5.00. Cf. *Claim Reviewer*, no. 4399c.

[88] Cloe, *op. cit.*, p. 1163.

The profession of the law is coming gradually to realize that the rewards of such practice are insufficient to attract its members, as indicated by a statement of the standing Committee on Unauthorized Practice of the Law of the American Bar Association made in November, 1939, to the effect that there are many technical fields of expert knowledge wherein those appearing have the right to present the facts, and that such appearance does not necessarily require knowledge of law.[89] Nevertheless, there still exists a certain *malaise* in the legal profession in regard to the idea of representation by laymen of claimants before governmental agencies, as shown by the appointment of a special committee of the New York State Bar Association in the fall of 1939 to study the subject.[90]

VII. APPEALS

An administrative procedure formulated to safeguard individual rights to benefit is based on the idea of administrative review of both law and facts by an impartial body whose action is not controlled by the original decision. In fact, an appeal of this nature not only protects the rights of clients but also hastens the prompt disposition of cases and relieves the courts of a duty which may be more satisfactorily performed by a body devoting its primary attention to the subject-matter of the statutory benefit.[91]

Despite the need for such appeal, considerable confusion has arisen as to its scope and its basis, particularly in the newer public assistance procedures. According to Webster's *New International Dictionary*, an appeal is "a proceeding to which a cause is brought from an inferior to a superior court for re-examination or review and reversal, retrial or modification." Yet in some public assistance procedures no appeal in this sense is possible and appeal has come to be used interchangeably with "fair hearing." In some states, a state agency makes all decisions on individual public assistance grants, and therefore there is no superior administrative authority to review the action.[92] In those states, a dissatisfied claimant for benefits must present his case to the officials, who bear the final administrative responsibility for the decision which aggrieves him. The only recourse in such a situation is the courts, as is provided in the laws of Connecticut and Iowa.[93]

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[89] New York State Bar Association, Lawyer Service Letter No. 39, Nov. 29, 1939, p. 156. The committee suggested that any unauthorized practice is capable of elimination where, upon knowledge of the facts and a presentation of public injury, the rules of practice and procedure of the agency in question be suitably amended and enforced.

[90] *New York Times*, Sept. 27, 1939.

[91] W. F. Dodd, *Administration of Workmen's Compensation* (1936), p. 785.

[92] For discussion of old age assistance, cf. Lansdale, etc., *op. cit.*, Chap. 14, *passim*.

In workmen's compensation and unemployment insurance, a real machinery for administrative appeal has been established. In those fields, it has already become apparent that the day is come when "supremacy of law" means the safeguards offered by administrative as well as judicial appeal. Although in New York State in 1938, referees to whom disputed claims for workmen's compensation were presented made final decisions in ninety-three per cent of all claims, and only seven per cent of the referees' decisions were appealed,[94] nevertheless the existence of the possibility of appeal constitutes an important safeguard for individual claimants. In the same year, referees had disallowed claims in forty-nine per cent of the cases and made awards in fifty-one per cent;[95] so other appeals might have been taken had claimants not been satisfied.

Application for review of the case is made in writing[96] to the industrial board. The granting or denying of an application for review is discretionary with the board, which may require argument on application before making a decision. It may at any time review any decision, and may increase, diminish, or end awards, subject to maxima and minima stated in the law, if applied to by any interested party on the ground of any change in conditions or proof of erroneous award.[97] If no application is made for review, the board may act of its own motion, as will be seen later.[98]

The law contemplated that appeals were to be heard by the full board, but the burden of work has grown so great that each member of the board has a separate calendar and hears appeals alone. His decision, however, constitutes the decision of the board,[99] unless he himself considers a question of fact or law to be of sufficient difficulty to warrant decision by the whole board, which then decides by majority vote. A person aggrieved by a decision of an individual board member may write to ask for review by the entire board, but this is granted at the discretion of the board member who originally reviewed the appeal. The freedom of action given the board is seen by the fact that on all applications for review, "the board may affirm, reverse, or modify any decision or award of a referee as the law and facts may require or may remand the case as the board may direct, or continue for further consideration by the board," as may be in the interest of justice.[100]

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[93] P. L. 1937, Title XIV, Ch. 99a, Sec. 397d (Conn.); 48 G. A. Iowa (1939, Ch. 140, Sec. 26.

[94] *Report of the Industrial Commissioner, op. cit.*, p. 73. [95] *Ibid.*, p. 72.

[96] Industrial Board Rules, Rule 13; within twenty days after filing of the referee's decision.

[97] *Consolidated Laws of New York*, Ch. 67, Art. II, Sec. 22. Change in conditions must be in the form of a verified medical report prepared as the result of an examination held after the expiration of a substantial period from the closing of the case, or an affidavit, if an examination cannot be held which would indicate the material change in the degree of disability which has taken place subsequent to the closing of the case. *Industrial Board Rules*, Rule 14. [98] *Ibid.*, p. 40.

[99] *Consolidated Laws of New York*, Ch. 67, Art. II, Sec. 27.

A similar board hears appeals under the New York unemployment insurance law. Within twenty days after a hearing at which an award has been made, any party who appeared at the hearing may take an appeal[101] to an unemployment insurance appeal board. Like the industrial board, this board is not responsible to the head of the state department of labor but occupies an independent status within the department. During the first six months of its existence, it was possible to have the full board participate in every case coming before it, but thereafter the increasing load of work made it necessary for the members to act individually.[102] Since then, the members of the board are assigned appeals in rotation[103] unless the cases involve the determination of policies or new problems of law which necessitate action of the entire board.

Because of the particular plan for hearings in Wisconsin, the law of that state allows final administrative appeal to be taken to the industrial commission of the state (the three-member commission in charge of labor law administration) within ten days after a decision is mailed to either party to the case. Within ten days, the commission may affirm, reverse, change, or set aside the decision, on the basis of evidence previously submitted, or may direct the taking of additional testimony.[104] The failure of the commission to act within the time specified constitutes an affirmance of the appeal tribunal decision.

Usually the same rules govern the fair hearing procedure in appeals as in the original hearing. Neither the industrial board nor the unemployment insurance appeal board in New York is bound by common-law or statutory rules of evidence, or by technical or formal rules of procedure, but the hearings are conducted in such a manner as to ascertain the substantial rights of the parties.[105] Although the boards are not required to hold a hearing on every appeal, they exercise their discretion broadly in favor of appellants before it. Notice is given to every interested party when appeals are re-taken, and all parties are notified that they may submit a brief or a written statement, or request a hearing, for the purpose of oral argument or to introduce new evidence. If the record is incomplete, the unemployment insurance appeal board, on its own motion, may set down the case for hearing.

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[100] *Industrial Board Rules*, Rule 13.

[101] *Consolidated Laws of New York*, Ch. 31, Sec. 531.

[102] *Annual Report of the Industrial Commissioner, op. cit.*, 1938, p. 156.

[103] *Consolidated Laws of New York*, Ch. 31, Sec. 518.6.

[104] Wisconsin Unemployment Compensation Act, Ch. 108, *Wisconsin Laws*, Sec. 108.09(6).

There are two important variations in types of appeal procedure. In one, the authority to which appeal is taken reviews both facts and evidence or only the facts, and may possibly take additional evidence; in the other, the case is remanded for rehearing to the officer who originally heard it.

In the first type of appeal, the important question is how far the facts should be given administrative review. Judicial review is increasingly limited in scope in all situations save where, as in the administration of the Federal Longshoreman's and Harbor Worker's Act,[106] it is geographically impossible to provide for administrative review. Therefore administrative review of the facts by an impartial body which at no previous stage of the proceedings has passed on them constitutes an additional safeguard for individual rights[107] whenever such review is possible. On the other hand, two hearings may simply add delay and expense to the proceedings and encourage dispute, and may tend to destroy the importance of the first hearing to such an extent that relevant information may not be presented until the second proceeding.[108]

The presentation of additional evidence on appeal constitutes another difficult problem. In workmen's compensation in New York, the evidence and testimony in the record alone are considered in the appeal of the case, whereas in unemployment insurance in the same state, the appeal board is empowered not only to review the facts but to hear additional evidence. The "board has definitely committed itself to factual review and does not hesitate to overrule a previous determination if in its opinion different findings would have been more reasonable under the circumstances. . . . Although the appeal board has said that 'new evidence' may not be presented on appeal, 'additional evidence' is heard in about one-fourth of the appeals. . . ."[109]

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[105] *Consolidated Laws of New York*, Ch. 67, Sec. 118, and Ch. 50, Secs. 533.2 and 523.1(c).

[106] Public No. 803, 69th Cong., 44 Stat. 1424, as amended June 25, 1938.

[107] Dodd, *op. cit.*, p. 785.

[108] Cf. Cloe, *op. cit.*, p. 1178.

If adequate opportunity is provided for full administrative review of both law and facts, and if an impartial body within the general administrative structure may hear evidence in addition to that presented at the original hearing, individuals receive greater assurance of complete consideration of their claims than otherwise, The path is thus opened for development of administrative review of such a scope that the traditional belief in law courts as the only adequate guardians of liberty may well be modified.

During the year 1938, 11,566 applications for review of workmen's compensation decisions were filed with the industrial board of New York, and of these, claimants submitted fifty-seven per cent of the total and insurance carriers the balance. Of the applications for review, fifty-three per cent of those submitted by claimants and sixty-three per cent of those submitted by insurance carriers were granted. During the same period, the board decided 3,501 cases, and in sixty-three per cent of these affirmed the decisions of the referees, in nine per cent modified their decisions, and required further evidence in eleven per cent of the cases.[110] During the same year, the newer unemployment insurance appeal board received 506 appeals, held 167 hearings, and disposed of 412 cases. Of the claims to benefits, fifty-three per cent were allowed, thirty-five per cent denied, and in twelve per cent benefits were allowed after a ten-week waiting period.[111] It is interesting to note the effect of the terms of the statute on the matter of appeals. Employers took appeals in about one-quarter of the cases before the board, and of these eighty-eight per cent involved the question as to whether an employer had properly reported the amount of an employee's wage—a question indirectly affecting the amount of an employer's contribution. In Wisconsin, where employers have a strong interest financially in enforcing the provisions of law disqualifying workers from benefits, employers were the appellants in about half the appeal cases, and three quarters of that number concerned the reason for leaving work.[112]

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[109] Cloe, *op. cit.*, p. 1178.

[110] *Annual Report of the Industrial Commissioner*, for 12 months ended Dec. 31, 1938, New York Legislative Document No. 21. [111] *Ibid.*, p. 154.

[112] Cloe, *op. cit.*, p. 1157, note 31.

If the presentation of additional evidence is not allowed before an appeal tribunal, it is imperative to allow claims to be remanded to the officer who conducted the original hearing for their receipt and consideration of further evidence. In workmen's compensation in New York, the industrial board has discretion to refer a case back to a referee to take additional testimony and evidence and for further discussion.[113] In such circumstances, he must take such additional testimony or proof as the board directs, and must then give his decision in the light of all the facts finally before him.[114] The 1939 amendments to the unemployment compensation law of New York authorize cases to be remanded to referees for decision where no oral argument is necessary and where additional testimony does not warrant a hearing before the appeal board.

Particularly in the newer and more experimental procedures such as public assistance, if it is learned that a mistake appears to have been made in reaching the initial determination, if new information is brought forth by the claimant, or if he feels that his circumstances have not been clearly understood, the agency that made the initial decision should have the opportunity to review the facts and to reconsider its previous action before a superior body takes action.[115] The advantage of this procedure may be seen: "When the local agency is given an opportunity to review its action prior to a state hearing, the state may easily determine whether the local agencies are making a genuine review of the case by requesting appellants to inform the state agency if they are not satisfied with the results of local review, and by requiring prompt reporting from the localities on the disposition of these cases. If cases from a particular jurisdiction on return to the state agency show both that the appellant is frequently in the right and that the local agency is failing to give a fair review of cases, it is conclusive evidence of the need to reorganize the local work. In short, if the local agency is given an opportunity to reconsider its action prior to formal review by a state agency, the local prerogatives are properly respected, the interests of the appellants are safeguarded, the state agency is relieved of much useless activity, and the state-control aspects of the appeal procedure are made much more effective."[116]

In order to facilitate decisions on points of law or policy, the various steps of administrative appeal may be omitted. Thus the industrial board, in workmen's compensation in New York, may in its discretion hold an original hearing on a case involving a novel question, or one of public policy, or one of jurisdiction.[117]

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[113] *Industrial Board Rules*, Rules 13 and 14.

[114] *Ibid.*, Application for a rehearing must be made within a reasonable time after the applicant has had knowledge of the facts constituting the grounds on which application is made.

[115] Lansdale, etc., *op. cit.*, p. 306.

[116] *Ibid.*, p. 307.

VIII. JUDICIAL REVIEW

The thorny problems involved in discussions of judicial review[118] are beyond the scope of this analysis of the methods by which individual claims to social benefits are handled during the administrative process. Yet it must be noted at this point that judicial review is the last line of defense of individuals whose claims to benefits are denied as a result of the decisions at the various stages of the administrative procedure. To the individual whose claim is not adequately handled by the official with whom he first comes into contact, there remains a hearing by an official one rung higher in the administrative scale, followed by an appeal to still higher authority for review, and last the age-old method of obtaining justice, by appeal to the courts. A realization has begun to creep into the law that these administrative procedures aim to see to it that "the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play"[119] and that the administration as well as the judiciary may well be guardians of individual rights as well as liberties.

Therefore, the power of judicial review has come to be increasingly restricted in these cases. The law of New York provides that the decisions of the industrial board are final on questions of fact in all matters within its jurisdiction, and even on questions of law if the board itself is party to an appeal to the courts.[120] But even such statutory provisions making administrative findings final are subject to the power of the courts to examine the entire record and review the facts and determine for themselves whether the findings are supported by substantial evidence.[121] Recent decisions of the courts have served to enforce and develop in a variety of situations the rule laid down by the Supreme Court over a quarter of a century ago: "Administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence;' or if the facts do not as a matter of law support the order made."[122] Yet recent decisions have served to reëmphasize the fact that the courts may not advantageously determine conflicts in evidence and pass on the credibility of witnesses,[123] else the judicial system usurps what should be merely administrative functions. "The experience of the past shows that when the courts are given power to review administrative decisions on the merits, they tend to substitute their judgment for that of the administrative agency, frequently stretching their jurisdiction to correct what they conceive to be the mistakes and injustices of the executive branch of the government, with results injurious both to the executive branch and to the courts themselves."[124]

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[117] *Industrial Board Rules*, Rule 11.

[118] Among the voluminous literature on judicial review of administrative action, Cf. J. Dickinson, *Administrative Justice and the Supremacy of Law* (1927).

[119] Morgan v. U. S., 304 U. S. 14 (1938).

[120] *Consolidated Laws of New York*, Ch. 67, Art. II, Sec. 23.

[121] Interstate Commerce Commission v. Union Pacific Ry. Co., 222 U. S. 541, 547, 548 (1912); Interstate Commerce Commission v. Louisville & Nashville Ry. Co., 227 U. S. 88 (1913); Helfrick v. Dahlstrom Metallic Door Co., 256 U. S. 199, 204, 205 (1931).

In the development of the service functions of government, it has become particularly clear that the trend of American opinion has begun to flow in the direction of belief in the efficacy of control exercised over minor officials by higher administrative officers. There is an increasing realization that there is no mysterious power in the judicial ermine to make judges of necessity more trustworthy than civil servants in their ability to reach fair conclusions concerning individual rights. In fact, even the courts themselves have begun to realize that the administration and the judiciary are coordinate, not opposed, branches of the government. This attitude is well evidenced by Mr. Justice Stone: " . . . in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instruments of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coördinated action."[125]

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[122] Interstate Commerce Commission v. Louisville & Nashville Ry. Co., 227 U. S. 88, 91 (1913).

[123] Del Vecchio v. Bowers, 296 U. S. 280, 286 (1935); Merchants Warehouse Co. v. United States, 283 U. S. 501 (1931).

[124] L. A. Tanzer, "Adequacy of the Due Process Clause," *Proceedings*, New York State Bar Association, 62nd Annual Meeting, 1939, p. 223. Cf. cases listed. For opposite point of view, cf. C. Duffy, "To What Extent Should the Decisions of Administrative Bodies be Reviewable by the Courts?," *Amer. Bar. Assoc. Jour.*, Oct., 1939, p. 848.

This new idea of interrelationship has developed because of the subject-matter with which administrative law has come to deal, and also in part because the number of administrative safeguards has grown and developed. As the trend toward administrative review has become more pronounced, the limitation on the right of judicial review has become more evident. It is true that "the history of Anglo-American courts and the more or less narrowly defined range of their staple businesses have determined the basic characteristics of trial procedure. Modern administrative tribunals are the outgrowth of conditions far different from those. To a large degree, they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. The most striking characteristic of the movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims."[126]

Therefore we must look to both the administrative and judicial branches of the government for the development of safeguards for individuals. The Supreme Court itself has reminded us that "courts are not charged with general guardianship against all potential mischief in the complicated tasks of government . . . Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."[127] Nevertheless the very existence of opportunity for judicial review is itself another guarantee for the rights of individuals.[128]

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[125] United States v. Morgan, 307 U. S. 783, 799 (1939). Cf. note, *Columbia Law Rev.*, Vol. 29, pp. 1406–1411 (Dec., 1939).

[126] Federal Communications Commission v. Pottsville Broadcasting Co., 60 Sup. Ct. 440, 441 (1940).

[127] Federal Communications Commission v. Pottsville Broadcasting Co., as cited.

[128] The record is usually sent to the state attorney-general's office, and there errors may be found which may necessitate return to the administrative organization for further investigation or correction or both. An attorney-general is not apt to proceed with a case if any administrative safeguards have been neglected. In workmen's compensation cases in New York, if a court appeal is taken at the same time as application for review by administrative authorities, procedure is shortened by a denial of administrative review so that formal findings of fact and rules of law may be prepared for court trial. *Industrial Board Rules*, Rule 16.

The Concurrent Resolution in Congress. Much has been said and written in recent years concerning executive usurpation of congressional powers. Little attention seems to have been given to encroachment by Congress on the President's right to give or withhold his approval of "every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment)."[1]

The encroachment is found, in legislation empowering the President to act, in the form of a reservation by Congress of the right to nullify or terminate such action by *concurrent resolution.* In spite of the apparently clear meaning of the words of the Constitution, concurrent resolutions have not, for more than a century and a quarter, been sent to the President for approval.[2] Heretofore, this has been excused on the ground, stated in a report of the Senate Judiciary Committee in 1897,[3] that a concurrent resolution does not contain a proposition of legislation. As stated in the House Manual, "in the modern practice, concurrent resolutions have been developed as a means of expressing fact, principles, opinions, and purposes of the two Houses . . . A concurrent resolution . . . is not sent to the President for approval unless it contains a proposition of legislation, which is not within the scope of the modern form of concurrent resolution."[4]

Unsuccessful attempts to extend the scope of concurrent resolutions were made in 1919 and 1920. In both the Senate and the House, concurrent resolutions to end the state of war with Germany were offered but did not emerge from committees in that form.[5] Eventually, the Congress adopted a joint resolution, approved by the President on July 2, 1921, declaring the state of war at an end. Another effort to extend the concurrent resolution's scope was blocked by President Wilson's veto of the Budget and Accounting Bill because it provided that the Comptroller General might be removed by concurrent resolution.[6] Unable to muster enough votes to pass the bill over the veto or to obtain a favorable majority for a modified version which would vest power of appointing the Comptroller General in the Supreme Court,[7] the bill's sponsors secured its enactment by the next Congress, after changing it so that the removal could be accomplished by joint resolution.[8] It should be noted that, even with this change, proceedings for removal must originate with Congress. Perhaps President Wilson would not have accepted the bill, even with this change, although Democratic Senator Robinson thought "that[it] would seem to meet, in large degree at least, the objection which was urged by the executive when he vetoed the bill."[9] President Harding approved the measure, perceiving no constitutional obstacle.

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[1] Constitution of the United States, Art. I, Sec. 7.

[2] Congressional practice, judicially upheld, also exempts from submission for presidential approval joint resolutions proposing amendments to the Constitution. Willoughby, *Constitutional Law*, 2d ed., I, p. 593.

[3] Report No. 1335, 54th Cong., 2nd Sess., Jan. 26, 1897, pursuant to S. Res., Feb. 20, 1896, asking for an interpretation of the clause in the last paragraph of the River and Harbor Act, July 13, 1892, providing for concurrent resolutions directing the preparation of estimates. See also, A. C. Hinds, *Precedents of the House of Representatives*, IV, sec. 3483.

[4] *House Document No. 700,* 75th Cong., 3rd Sess., sec. 396.

[5] C. A. Berdahl, *War Powers of the Executive in the United States,* Univ. of Illinois, Studies in the Social Sciences, Vol. IX, Nos. 1 and 2, pp. 224–227.

[6] Veto message, returning H. R. 9783 without approval. *Cong. Rec.*, 66th Cong., 2nd Sess., p. 8609 (June 4, 1920).

In circumstances seemingly much more favorable politically to the chief executive than when Wilson vetoed the Budget and Accounting Bill, President Roosevelt has signed two important measures, the Reorganization Act of 1939 and the so-called Lend-Lease Act of 1941, in which Congress reserves the right, by concurrent resolution, to nullify or terminate the exercise of powers therein granted to the President. Section 5 of the former act provides, in part, that "the reorganizations specified in the plan shall take effect in accordance with the plan: (a) upon the expiration of sixty calendar days . . . only if during such sixty-day period there has not been passed by the two Houses a concurrent resolution stating in substance that the Congress does not favor the reorganization plan."[10] Similarly, Representative Dirksen's amendment incorporated in section 3-c of the Lend-Lease Act says: "Nor shall such powers be exercised if terminated by a concurrent resolution by both Houses of Congress."[11]

The congressional debates show a wide difference of opinion as to the effect of the foregoing provisions. With regard to the restrictive clause in the Reorganization Bill, Representative Detter quoted from a letter in which President Roosevelt had called attention to "the constitutional question involved in the passage of a concurrent resolution, which is only an expression of congressional sentiment," and had asserted that "such a resolution cannot repeal executive action taken in pursuance of law."[12] Representative Wolcott declared: "A concurrent resolution, therefore, which gives either positive or negative legislative effect to any action comes within the category of those orders, resolutions, or bills mentioned in the Constitution, and must be presented to the President for approval."[13] A similar view had been expressed by Representative James W.

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[7] H. R. 14441. *Ibid.*, 8647 (June 5, 1920).

[8] Sec. 303 of the act, approved June 10, 1921, provides for removal by joint resolution.

[9] *Cong. Rec.*, 67th Cong., 1st Sess., p. 659 (Apr. 26, 1921). Senate Minority Leader Underwood also supported the bill.

[10] 53 *Stat.*, 562–563.

[11] *Cong. Rec.*, 77th Cong., 1st Sess., p. 767 (Feb. 6, 1941).

[12] *Cong. Rec.*, 76th Cong., 1st Sess., p. 2479 (Mar. 8, 1939).

[13] *Ibid.*, p. 2478.

Good, House sponsor of the budget and accounting bills in 1919 and 1920. He said: "My understanding of a concurrent resolution is that if it has the effect of law it must be signed by the President. The name offered to a resolution of this kind does not determine its status. We cannot pass a resolution that has the effect of law without the signature of the President of the United States."[14]

Supporters of the clauses in the Seventy-sixth and Seventy-seventh Congresses, on the contrary, were positive that they provided a means to get around the requirement of executive approval. According to Representative Cox, "To say that the Congress cannot attach the condition that it is within the power of either House to vacate whatever is done under the grant is clearly unsound. The condition is part of the legislation."[15] When Representative Taber, who wanted to accomplish the same result, declared that "the resolution, under the Constitution, would have to be submitted to the President for his approval," Cox's reply was, "Not at all, sir." He explained that "the Congress, in the bill before us, proposes to set up a condition whereby the two Houses through joint action can negative, not an executive order, but a report made by the delegate of the Congress itself, acting as a ministerial agent."[16] Claiming the provision in the Reorganization Act as a precedent, Representative Dirksen defended his amendment to the Lend-Lease Bill, asserting that "by concurrent resolution of the two houses, without the necessity of the signature of the President, we can reach out in case of excesses and abuses and take back the legislative power that is today being delegated. . . . We can make firm and certain that the exclusive war-making power of the Congress will not leave this body."[17]

The reasoning of the advocates of this use of the concurrent resolution seems faulty in at least three particulars. First, it is obvious that they seek to avail themselves of the long-established practice of not submitting concurrent resolutions to the President at the same time that they attempt to convert them to a new use. Second, to say that the President acts as a "ministerial agent" of Congress in preparing reorganization plans is hardly consistent with the accepted doctrine that the Constitution established three coördinate branches. Finally, the simple majority requisite for passing a concurrent resolution does not have the "exclusive war-making power" which Representative Dirksen conveniently assumed.

The attitude of the majority leaders in Congress toward this new use of concurrent resolutions has not been entirely clear. Without strenuously resisting the move to put the reservation in the Reorganization Bill—perhaps because the leading advocate in the House was Representative Cox, a Democrat—the Administration's forces avoided the issue by securing the adoption of a joint resolution providing that Reorganization Plans No. 1 and 2 should take effect on July 1, 1939, "notwithstanding the provisions of the Reorganization Act of 1939" which would have deferred the plans' going into effect until sixty days after their submission, respectively, on April 25 and May 9, 1939.[18] After the Dirksen amendment to the Lend-Lease Bill had been accepted in the House committee of the whole by the narrow margin of 148 to 141, Majority Leader McCormack said: "I can assure the members of the House there will be no effort made to take the Dirksen amendment out of the bill. The Dirksen amendment states that Congress, by concurrent resolution, and this means a majority vote in both branches, can declare that the emergency does not exist any more."[19] The statement seems to indicate that the House leadership acquiesced in the projected use of the concurrent resolution to vacate or terminate powers granted to the President. Representative Dirksen later cast doubt on this assumption by quoting from a United Press dispatch, dated February 6 (the day his amendment was adopted) as follows: "Both Democratic Leader John W. McCormack and Speaker Sam Rayburn said they did not believe that a proposed amendment by Everett M. Dirksen, Republican, Illinois, providing specifically that the President's power under the bill can be terminated by a concurrent resolution of Congress at any time, would be any limitation at all."[20] Neither McCormack nor Rayburn disavowed the United Press story in the ensuing debate.

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[14] *Cong. Rec.*, 67th Cong., 1st Sess., p. 1855 (May 27, 1921). Obviously he meant that the Congress could not pass the resolution by a simple majority "without the signature of the President."

[15] *Cong. Rec.*, 76th Cong., 1st Sess., p. 2477 (Mar. 8, 1939).

[16] *Ibid.*, p. 2479.

[17] *Cong. Rec.*, 77th Cong., 1st Sess., p. 767 (Feb. 6, 1941).

Perhaps the termination of the President's power by concurrent resolution is no limitation at all. Perhaps the congressional leaders tolerate the clause as a face-saving device for members who are uncertain of their constituents' reactions. Yet there must be some significance for the constitutional balance of powers in the politically-powerful President Roosevelt approving important legislation in which Congress has reserved the right to terminate the powers therein granted by concurrent resolution. Even if the reservation is not likely to be exercised in the near future, the inclusion of the clause establishes a precedent.[21]

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[18] S. Joint Res. 138. 53 *Stat.* 813, approved, June 7, 1939. Reorganization Plans 1 and 2. *Ibid.*, pp. 1423, 1431.

[19] *Cong. Rec.*, 77th Cong., 1st Sess., p. 844 (Feb. 8, 1941). [20] *Ibid.*

[21] There would seem to have been more reason, so far as subject-matter of legislation is concerned, in providing that the determination of the method of apportioning representatives among the states should be by concurrent resolution. But the

Divisions of Opinion Among Justices of the U. S. Supreme Court, 1939–1941. "We are under a Constitution," said Charles Evans Hughes when he was governor of New York, "but the Constitution is what the judges say it is . . . " Several theories of jurisprudence have arisen which attempt to take into account this personal element in the judicial interpretation and making of law. The so-called "realistic" school has argued that law is simply the behavior of the judge, that law is secreted by judges as pearls are secreted by oysters.[1] A less extreme position was taken by the late Justice Holmes, who said: "What I mean by law is nothing more or less than the prediction of what a court will do." While these views go rather far in eliminating any idea of law as a "normative, conceptual system of rules," no one doubts that many judicial determinations are made on some basis other than the application of settled rules to the facts, or that justices of the United States Supreme Court, in deciding controversial cases involving important issues of public policy, are influenced by biases and philosophies of government, by "inarticulate major premises," which to a large degree predetermine the position they will take on a given question. Private attitudes, in other words, become public law.

More precisely, it is the private attitudes of the majority of the Court which become public law. As an inexact science, issues at law are settled by counting the noses of jurors and justices. About 150 times every term the judges of the Supreme Court announce to the world in a formal written opinion the result of their balloting on the questions raised by a legal controversy before the Court. Happily, in the great majority of these ballots the decision is unanimous. In such cases, presumably the facts and the law are so clear that no opportunity is allowed for the autobiographies of the justices to lead them to opposing conclusions. It is always possible that the members of the Court may be agreeing for different reasons, but no hint of that fact is given unless concurring opinions are written.

In a substantial number of cases, however, the nine members of the Court are not able to see eye to eye on the issues involved. Working with an identical set of facts, and with roughly comparable training in the law, they come to different conclusions. If our thesis is correct, these divisions of opinion grow out of the conscious or unconscious preferences and prejudices of the justices, and an examination of these disagreements should afford an interesting approach to the problem of judicial motivation.

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act to provide for the Fifteenth and subsequent decennial censuses and to provide for apportionment of representatives in Congress, approved June 18, 1929, in Sec. 22 (b), provides the method which shall be employed "if the Congress . . . fails to *enact a law* apportioning Representatives among the several States," after the President has submitted a statement showing the results of applying various mathematical methods.

[1] This figure and the quotations following are taken from Francis D. Wormuth, "The Dilemma of Jurisprudence," in this REVIEW, Vol. 35 (1941), p. 44.

These cases in which dissent is expressed are particularly deserving of study because they furnish data which are not simply the verbalizations of justices, to be handled by the typical process of interpretation, analysis, comparison, search for inconsistencies, and general legal exegesis. Instead, they contribute the tangible data of a series of yes and no votes on a variety of issues. Analysis of this voting behavior should be of value in explaining Supreme Court action, in revealing basic relationships among the justices, and, in short, in "predicting" the law.

It may be suggested that the nature of the division of opinion on the Supreme Court at any given time is a matter of common knowledge among those who follow Supreme Court thinking. In the hope, however, that a more precise analysis might have some value, the divisions of opinion in Supreme Court decisions during the past two years (the October terms, 1939 and 1940) have been analyzed. This period was one in which the membership of the Court was fairly stable. The only changes in its composition came when Butler died soon after the beginning of the 1939 term (without having participated in any cases) and was replaced by Murphy, and when McReynolds resigned during the 1940 term.

During this two-year period, dissent was registered to more than one-fourth of the decisions rendered by the Court. In the 1939 term, the rate was 30 per cent (42 dissents in a total of 140 decisions), and for the 1940 term it dropped slightly to 28 per cent (47 dissents out of 169 decisions). There were thus 89 decisions during the period in which one or more of the justices dissented, at least in part, from the conclusion reached by the majority.[2] Table I shows the extent of each justice's participation in these dissents. The judge most persistent in disagreement was McReynolds, who took a minority stand in 22 per cent of the decisions in which he participated. Justices Roberts and Hughes were next in order, with records of 18 per cent and 12 per cent respectively. On the other hand, Frankfurter found himself on the losing side in only four of the 309 decisions rendered by the Court, a fact which calls attention to the central position which he appears to occupy on the Court. It should also be noted that he was the only justice whose dissents did not increase in number from 1939 to 1940 (with the exception of McReynolds, who did not serve out the 1940 term).

[2] It should be noted that some 10 or 11 of these dissents were in "companion" cases, i.e., cases involving an issue identical with that decided in a preceding case, and requiring little or no new discussion. For statistical treatment, these cases might have been eliminated, to prevent double weight being given to divisions of opinion in a single situation. However, they have not been excluded, for various reasons, and it is not believed that any distortion has resulted from their inclusion. In two cases (61 S.C. 845, 861), there are dissents by two groups of justices involving separate aspects of the decision; these have been treated as two distinct dissents, and thus there are 91 dissents in the 89 cases.

Justices Reed, Murphy, and Stone are also shown by the data to be consistently members of the Court's majority.

TABLE I
PARTICIPATION OF SUPREME COURT JUSTICES IN DISSENTING OPINIONS, 1939 AND 1940 TERMS

Justice	*Number of Dissents*			*Opinions Participated In*	*Per Cent Dissents*
	1939	*1940*	*Total*		
McReynolds*	32	9	41	184	22
Roberts	23	31	54	300	18
Hughes	14	24	38	305	12
Black	4	15	19	306	6
Douglas	4	15	19	303	6
Stone	4	7	11	303	4
Reed	1	8	9	302	3
Murphy**	1	6	7	215	3
Frankfurter	2	2	4	309	1

* Resigned February 1, 1941.
** Began service February 5, 1940.

Of these 89 dissents, 25 were one-man affairs. McReynolds dissented alone in 13 cases, Roberts in 10, and Reed and Stone once each. In the other 64 dissents, the concurrence of two, three, or four justices in deviation from the majority view raises interesting problems of judicial interrelationships. Was there a regular pattern of dissent? Did certain justices tend to agree with each other in expressing dissent? Table II attempts to answer such questions by showing the number of times each justice joined each other justice in a dissenting opinion. A well-defined pattern of relationships was found to exist on the Court, and the names have been arranged in the table so as to bring out this relationship most clearly. Figures on the one-man dissents have been included in parentheses.

The table appears to reveal a marked division of the justices into two wings or groups. The first is composed of McReynolds, Roberts, Hughes and Stone; the other includes Murphy, Frankfurter, Black, and Douglas. With the exception of two cases, no justice in one of these groups ever joined in a dissenting opinion with a justice from the other group. While every one of the eight justices on occasion dissented in company with other members of his own bloc, in only two out of 89 dissents was there fraternization with the enemy. Both of these exceptional cases saw Roberts crossing the line to vote with Black and Douglas.[3] Justice Reed presents a special problem, since he was found in company with justices from both groups. His nine dissents included four with judges from each wing, and one lone dissent. He thus appeared to have one foot in each camp.

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[3] The cases are Neuberger v. Commissioner of Internal Revenue, 61 S.C. 97 (1940), and Union Pacific Rr. Co. v. U. S., 61 S. C. 1064 (1941).

To the extent that the above table appears to show the existence of two self-contained blocs of opinion on the Court, it obviously misrepresents the situation. The pattern of relationships which begins to emerge from the table needs to be made clearer by presenting more complete data which will show all judicial agreements, whether on the majority or minority side. Table II reveals that Frankfurter and Hughes were never in dissent together, but it does not tell us how often they agreed with each other when other justices were in dissent. Table III, consequently, is arranged to show the extent of agreement between each pair of justices in the 89 controversial cases (or rather, in so many of them as were participated in by that pair). The number of agreements is expressed in percentages of total cases participated in by each pair.

TABLE II

AGREEMENTS AMONG SUPREME COURT JUSTICES IN DISSENTING OPINIONS, 1939 AND 1940 TERMS

Justice	*McReynolds*	*Roberts*	*Hughes*	*Stone*	*Reed*	*Frankfurter*	*Murphy*	*Black*	*Douglas*
McReynolds	(13)	26	20	4	2				
Roberts	26	(10)	33	5	3			2	2
Hughes	20	33	—	10	3				
Stone	4	5	10	(1)	1				
Reed	2	3	3	1	(1)			4	4
Frankfurter						—	1	4	4
Murphy						1	—	7	7
Black		2			4	4	7	—	19
Douglas		2			4	4	7	19	—

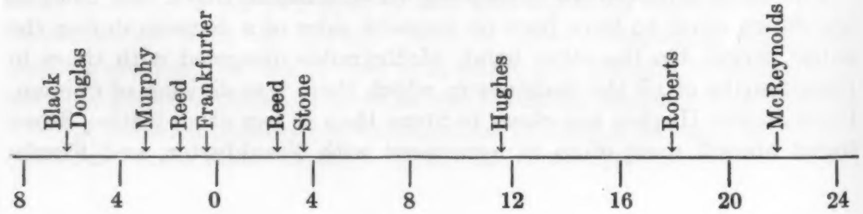
The table reveals some interesting facts. Justices Black and Douglas are shown never to have been on opposite sides of a decision during the entire period. On the other hand, McReynolds disagreed with them in three-fourths of all the decisions in which there was division of opinion. Chief Justice Hughes was closer to Stone than to any other justice, Stone found himself most often in agreement with Frankfurter, and Frankfurter's views coincided most often with those of Murphy. The most important fact about this complex of individual relationships, however, is that it conforms to a basic underlying pattern. Examination of the table shows that with the justices ranked as they are, every member of the Court is placed next to or between the justice or justices with whom he is most completely identified in agreement, and farthest away from those with whom he has least in common. The only important exceptions to this rule are found in the McReynolds-Murphy and the Stone-Frankfurter relationships.

TABLE III
AGREEMENTS AMONG SUPREME COURT JUSTICES IN CONTROVERSIAL CASES, 1939 AND 1940 TERMS
(In Percentages)

Justice	*McReynolds*	*Roberts*	*Hughes*	*Stone*	*Reed*	*Frankfurter*	*Murphy*	*Black*	*Douglas*
McReynolds	—	64	64	41	35	31	38	24	24
Roberts	64	—	75	51	45	45	39	37	36
Hughes	64	75	—	78	63	64	53	49	49
Stone	41	51	78	—	81	84	75	69	68
Reed	35	45	63	81	—	86	80	79	79
Frankfurter	31	45	64	84	86	—	91	85	84
Murphy	38	39	53	75	80	91	—	89	89
Black	24	37	49	69	79	85	89	—	100
Douglas	24	36	49	68	79	84	89	100	—

The division of opinion thus takes the form of the figure below, which locates the justices along a continuum from one extreme to the other according to the direction and intensity of their deviation from the normal majority position of the Court, represented by the zero point on the scale.

Deviations Expressed in Percentages



Frankfurter is closest to this point, since he dissented from only one per cent of the Court's decisions. Reed is given a position on both sides of the zero point, since his dissents were divided between the two wings. The scale makes apparent the existence of a fairly cohesive six-judge majority, most of the dissents being entered by the right-wing minority of McReynolds, Roberts, and Hughes.

This use of the term "right-wing" assumes that the division of opinion on the Court results from differences of opinion as to desirable public policy. It assumes that the above scale reflects relative "liberalism" and "conservatism" as those terms are understood by the man in the street. This assumption should be checked by an examination of the issues actually involved in the cases where dissents were filed. Did all of these cases present issues of public policy on which liberals and conservatives might well be expected to differ, or did a number of them involve "purely legal" questions? A proper answer on this point would require the setting up of elaborate criteria for distinguishing between these two kinds of issues, and application of the criteria in a detailed analysis of each case. Such an analysis has been attempted here to only a limited degree, and covering only the dissents of the 1939 term.

A case which requires a decision as to the extent of governmental powers, or presents an issue between the government and an individual, is obviously one in which the result may be affected by the judges' views on public policy. Our present stereotypes picture the conservative as anti-government (in the sense of opposing new or more effective forms of governmental control over individuals or corporations), and the liberal or New Dealer as pro-government.[4] An examination of the 1939 term's 42 dissents shows that in at least 36 an issue was presented which required the justices to vote for or against the government, to uphold or deny a government contention, to approve or disapprove an exercise of governmental authority.[5] The voting record of the justices in these 36 cases shows that in 27 the dissenters were right-wingers taking an anti-government position; in three more cases, the dissenters were left-wing justices voting for the government. Thus in 30 of the cases judicial action ran true to form.

Of the six remaining cases in this group, four saw the situation exactly reversed, with the government's support coming from the right wing.[6] The explanation is simple, however. All four were civil liberties cases (involving free speech, the right to picket, and freedom from wire-tapping), and in all four McReynolds was the lone dissenter voting to uphold government restrictions on individuals. His action was in line with the traditional conservative position on the Court. It will be recalled that in 1931 the famous free press case of Near v. Minnesota[7] brought out a perfect conservative dissenting lineup of Butler, Van Devanter, McReynolds, and Sutherland. By the 1939 term, only one of this old guard remained to take a stand against civil liberties.

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[4] The Court's newest justice, former Attorney-General Jackson, has recently commented feelingly on the "anti-government" attitude (not simply anti-New Deal) of the Court's conservative majority during the pre-deluge period of 1935–1936. See Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York, 1941), p. 170.

[5] The citations are: 308 U.S. 147, 313, 331, 338, 473, 488; 309 U.S. 33, 70, 83, 106, 149, 176, 310, 331, 350, 370, 430, 517, 527, 530, 551; 310 U.S. 53, 69, 80, 88, 106, 113, 141, 150, 371, 381, 434, 534, 554, 573, 586.

In the remaining two of these 36 dissents, the vote is completely inexplicable in terms of the scale positions of the justices. One dissent was that of Justice Stone in the well-known flag salute case,[8] in which he alone maintained a strict civil liberties position in the face of the justification for the compulsory salute which the rest of the Court found compelling. The other exception came in a case presenting the thorny question of taxability of trust income, and saw Reed alone voting for the government's contention.[9] Apart from these cases, however, the judicial reaction to a "government" issue was so consistent that it must be considered a definite factor in the Court's divisions of opinion.

Examining the 42 dissents of the 1939 term from another point of view, we find 18 cases in which the Court was required to make a decision for or against "business."[10] The issue was presented in many forms—the validity of a business tax, an alleged violation of the anti-trust laws, the constitutionality of a federal or state regulatory scheme. But wherever the issue was present, the reaction pattern was consistent, support for business coming always from the conservative end of the Court. Specifically, there were 15 dissents by right-wingers taking the side of business, and three by liberals voting against a majority decision favorable to business. Again, in five cases during the 1939 term the Court was dealing with a "labor" issue, and here also the reaction was uniform.[11] There were four conservative dissents to decisions favoring labor, and one dissent by Douglas and Black from a majority decision slightly weakening the effect of a N.L.R.B. order.

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[6] Schneider v. State, 308 U.S. 147 (1939); Nardone v. U.S., 308 U.S. 338 (1939); Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940). [7] 283 U.S. 697 (1931).

[8] Minersville School District v. Gobitis, 310 U.S. 586 (1940).

[9] Helvering v. Fuller, 310 U.S. 69 (1940).

[10] The citations are: 308 U.S. 165, 331; 309 U.S. 190, 280, 310, 350, 370; 310 U.S. 1, 53, 113, 141, 150, 371, 381, 434, 469, 534, 573.

[11] National Licorice Co. v. N.L.R.B., 309 U.S. 350 (1940); Paramino Co. v. Marshall, 309 U.S. 370 (1940); Thornhill v. Alabama, supra; Carlson v. California, supra; Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

The 1939 dissents included seven cases in which state or local action was attacked as violating provisions of the federal Constitution; for example, state and local taxes were resisted as burdening interstate commerce or contrary to due process or infringing a privilege of national citizenship.[12] Here the consistent policy of the justices at the Black-Douglas end of the Court was to uphold state action, in line with the traditional liberal belief that state legislative powers should be left as unrestricted by federal constitutional limitations as possible. It may also be noted that an issue involving the extent of judicial review was raised in some form in four cases; the left-wing wanted to narrow review, and the right-wing opposed any narrowing.[13] Public operation of a power system was an issue in one case; McReynolds opposed it.[14] The rights of a debtor under the Frazier-Lemke Act were involved in another case; a liberal minority voted in his favor.[15]

One or more of the seven issues just considered was present in every one of the cases where opinion was divided during the 1939 term. In other words, none of these cases appears to present a "purely legal" question, for in each instance the observer can find a facet of the case which might offer an opportunity for the decision to be influenced by judicial views as to desirable public policy. It is not contended, of course, that the decisions were motivated wholly by the personal views of the justices, but the data clearly indicate that these views had a considerable effect in the process of making up the judicial mind.

It would be interesting to discuss the records of several of the individual justices in the light of the information which this analysis has supplied. The case of the Court's new Chief Justice is particularly worthy of notice. The participation of Justice Stone in right-wing dissents may seem strange, in view of his reputation as one of the soundest and ablest liberals on the Court. Two explanations suggest themselves. One is that he has deviated slightly to the right in his views with the passage of time. The other is that he has maintained very nearly his original position, but that the Court has with recent appointments moved so substantially leftward that views which put Stone to the left of the Court ten years ago now occasionally leave him exposed in dissent on the right. Whatever the cause, the process appears to be accelerating, for Stone's dissents with the conservative group numbered three in the 1939 term and six in the 1940 term.

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[12] McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940), and two companion cases; Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939); Madden v. Kentucky, 309 U.S. 83 (1940); McCarroll v. Dixie Greyhound Lines, 309 U.S. 176 (1940); Osborn v. Ozlin, 310 U.S. 53 (1940).

[13] McCarroll v. Dixie Greyhound Lines, *supra*; Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); U.S. v. Bush & Co., 310 U.S. 371 (1940); Railroad Commission v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940).

[14] U.S. v. San Francisco, 310 U.S. 16 (1940).

[15] Union Joint Stock Land Bank v. Byerly, 310 U.S. 1 (1940).

The general result of this study has been to emphasize the influence of personal attitudes in the making of judicial decisions and the interpretation of law.[16] To prevent over-emphasis on this point, it would be well to recall that even in a Court representing as wide a range of views as has been found during the last two terms, 71 per cent of the cases were decided by unanimous vote. Where there were divisions of opinion, however, they appear to be for the most part explicable in terms of the opinions of the respective judges on public policy. This conclusion hardly comes as a surprise. For few are likely to deny that justices of the Supreme Court have always, to paraphrase Justice Frankfurter, "read the laws of Congress through the distorting lenses" ground by their own experience. On the other hand, there are many who will agree that the Supreme Court's vision is better today than it has been for many years past.

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Unconstitutional Legislation in Minnesota.[1] This study is concerned with certain phases of the operation of the power of the courts to declare legislative enactments unconstitutional. It is concerned with the exercise of this power rather than with the rules governing or applicable to the exercise of the power itself. For this reason, it might be thought of as a fact-study in the field of unconstitutional legislation. This does not mean that the rules and principles of law applicable to the subject are ignored, but it means that they are assumed as a background against which the study is to be placed.

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[16] One further illustration of this point may be supplied. During the 1940 term, the Supreme Court twice had to consider problems raised by the establishment of a new terminal produce market at Kansas City, Kansas, which was promoted by the Union Pacific Railroad and the city in an evident effort to attract trade away from the existing terminal at Kansas City, Missouri. The legal questions raised in the two cases were quite different. In the first (L. Singer & Sons v. Union Pacific R. Co., 61 S.C. 254 (1940)), the question was whether Kansas City, Mo., could as a "party in interest" under the Transportation Act of 1920, seek to enjoin the construction of an extension by the railroad to serve this competing market. In this case, the city lost. In the second case (Union Pacific R. Co. v. U.S., 61 S.C. 1064 (1941), the question was whether the Elkins Act had been violated by the action of Kansas City, Kan., which, in coöperation with the railroad, had offered concessions to induce leasing of space in the new terminal. Here the court held that the act had been violated. Seven members of the court participated in both decisions, and it is interesting to note that three of the justices (Roberts, Douglas, and Black) took a position on the legal points involved which favored the new terminal in both cases, while three other justices (Stone, Hughes, and Reed) opposed it in both cases. Justice Frankfurter alone switched sides between cases, and was with the majority in both. This incident suggests that the judges decided the legal questions in terms of their attitude towards the terminal and the justifiability of this kind of competition.

[1] Assistance in the preparation of these materials was furnished by the personnel of the Work Projects Administration, Official Project No. 165-1-71-154. A research grant was received also from the Graduate School Research Fund of Indiana University.

In studying the legal phases of unconstitutional legislation over a period of several years, the author became interested in certain questions to which the answers could not be found in the formal rules of law themselves. He wondered whether unconstitutional laws were questioned in court soon after they were enacted or long thereafter. He was interested to learn whether judges divided or agreed among themselves, for the most part, on constitutional issues. The discussion of injunction in recent literature led him to ask what rôle injunction had played in litigation resulting in declaring statutes invalid. What remedies were the more common in this field of litigation? What were the subjects with which unconstitutional statutes dealt? These and numerous other questions came to mind as he worked upon the materials, and as a result he undertook an inquiry into some of the sources in which the answers could be found. Minnesota was selected as one of the states to be studied, and certain phases of Minnesota experience were explored. Those which have been sufficiently explored to justify presentation to the bench and bar and interested scholars are dealt with in this article. More extensive studies will be required to follow to its last implication each and every query that arises upon reflection. But it is felt that the studies have progressed sufficiently to permit of some general conclusions, and these are offered in connection with the analyses as very tentative, indeed, yet as justified by the Minnesota materials.

I

The historical incidence of judicial review and of unconstitutional legislation in Minnesota can best be presented in the form of a table. The list given below presents these materials from the beginning of the state up to about eight years ago. As one studies this table, certain facts stand out as quite obvious. The difference between particular sessions of the legislature in their experience with statute-making, one session having few unconstitutional statutes in its product and another having several, is of course noticeable, but even more striking than these differences is the long upward swing of the curves. There are periods in the history of the state when the legislature experiences greater difficulty than in other periods with the operation of judicial review.

To illustrate, it is clear that fewer unconstitutional laws were enacted during the period from 1854 to 1895 than after 1895. That is, fewer laws were declared unconstitutional during that period. It is obvious that the session of 1867, as well as the sessions of 1869, 1870, 1875, 1876, and 1879, had much less difficulty on this score than did those of 1877, 1881, and 1895. Were the lawyers less active during the earlier period of the state's history in this field, or less learned? Did it become a fashion with higher standards of admission to the bar to assail the constitutionality of legislation? With respect to the composition of the legislature, certainly the number of lawyer-legislators has always been large enough to have saved the sessions from constitutional mistakes both in the earlier years and in the later years. The answer cannot be found in that quarter. Were different interest groups affected by legislation as time went on; or did the character of laws change?

Number of Unconstitutional Statutes Enacted at Each Session of the Legislature of the State of Minnesota

Session	*No. of Statutes*	*Session*	*No. of Statutes*	*Session*	*No. of Statutes*
1854	1	1877	5	1903	4
1857	1	1878	4	1905	4
1858	4	1879	1	1907	6
1860	3	1881	7	1909	4
1862	3	1883	2	1911	2
1863	1	1885	5	1913	6
1864	1	1887	6	1915	2
1865	1	1889	6	1917	4
1866	5	1891	7	1919	3
1867	1	1893	6	1921	3
1868	1	1894	4	1923	10
1869	1	1895	12	1925	6
1870	1	1897	8	1927	4
1874	2	1899	3	1929	7
1875	1	1901	7	1931	2
1876	1	1902	1	1933	2

When the materials are broken down into component parts and the subject-matter of statutes is analyzed, it becomes clear that certain subjects play a more prominent rôle than others in unconstitutional legislation. Distress legislation, though on its face not always seeming to be of that type, accounts for some of the cases between 1877 and 1902. New subjects for the legislature to concern itself with, such as corporations, account for a few more cases. Counties, as a subject, similarly can always be depended upon to furnish some unconstitutional enactments throughout the entire period. Separation and delegation of powers dealing with the relation of the courts to the other branches of government also yielded some cases during this period. Political party developments and shifts bring up a few unconstitutional statutes, as in 1879, 1887, and 1894. Homesteads, estates, insurance, licenses (showing the rising problem of protecting home markets), liens, mortgages, municipal government, and officers account for still more. One gets the feeling as he runs through the cases that during this period the legislature was called upon to enact laws upon an increasing number of subjects, and that as it entered new regulatory fields it was working out new techniques, feeling its way as it went. Beginning with this period, statutes falling under the heading of police power legislation tend to come to the fore. Railroad legislation and tax legislation, quite naturally in the light of the state's general development, likewise show up as friction points in the legislative process.

In the later periods, some new subjects crop up, such as schools, public improvement legislation, more of local government problems, and of taxation, and roads and bridges (now commonly thought of as highways), continue to appear.

The first two decades of the present century were relatively quiet, but the twenties show difficulties again. It will be interesting to see whether our constitutional fever chart shows another continued upward swing during the depression years (meaning until 1940). Further studies will be necessary to answer this question.

From the standpoint of political parties and their programs and their control of legislature and court, the conclusion is pretty clear that there is very little, if any, substantial connection between the two. The judicial branch of Minnesota government has, with only a few notable exceptions, been relatively stable from a political point of view, with a strong tendency towards electing the sitting judges, augmented by nonpartisan election in recent years, and this is especially true of the supreme court of the state. There is no substantial evidence to indicate that there is any correlation between one or another party being in control of the legislature and the amount of unconstitutional legislation being enacted. That there is some correlation between social and economic distress and unconstitutional legislation has been mentioned, and of course there is some correlation between economic distress and third party movements. This, however, in the case of Minnesota, seems not to be borne out completely, because in more recent times the third party movements have tended to become stabilized into a second major party, and the figures do not bear out the assumption that this correlation might run throughout its course. In general, the relationship between social unrest and unconstitutional legislation is not nearly as striking as one might expect, and the facts, as noted above, cannot be accounted for by the existence of an elective judiciary.

II

How long a period elapses between the time when a statute is enacted and when it is assailed? How much time is consumed in determining the question of constitutionality?

From some points of view, the practice of judicial review is very unsystematic and accidental. Courts do not sit as councils of censors and declare the particular enactments of the legislature constitutional or unconstitutional as they are signed by the governor and deposited in the office of the secretary of state. Unconstitutional statutes, known to be such by all concerned, as in the cases of special and local laws, often remain on the statute-books for years without being questioned, and for all that we know will remain there indefinitely. Under our common law system, as it is augmented by procedural statutes, the judicial practice of invalidating statutes is brought into operation only when private litigants initiate the procedures. If, as occasionally occurs, the government, acting in the person of an official, initiates the procedure, the common law technique still applies. This common law feature of our practice will be mentioned again in another connection, but it is one of the basic factors conditioning the operation of judicial review as a political or governmental institution in American life.

Based, as this practice is, upon the conception of injury to legal rights, court procedure in this field, as in others, operates at the instance of an individual or corporation, and this means that an action may be brought or a suit may be filed six months after enactment, or six years thereafter, or even 60 years later. The time when the action is brought may, of course, in some instances affect the likelihood that the statute will be held constitutional, although time alone is not a determinative factor in all cases.

The data on the period between enactment and the raising of the question in the *trial court* were not available for a large number of cases, and it would have been necessary to consult the court records in almost all the districts of the state in order to complete the picture. In the small sampling that was feasible, involving slightly over 30 cases, the author's eye took note of the fact that one case fell under each of the headings of 10, 15, and 20 years. In three instances, four years elapsed between enactment and the first challenge.

The chart showing the number of years elapsing between enactment and *final decision* covered such a large number of cases that the figures permitted of different treatment. The average number of years was four and one-half. At the outer limits, statutes ran for 40, 25, 20, and 15 years in individual instances. Twenty-four statutes were in force for 10 years before being held unconstitutional. Fourteen statutes were in operation for five years before being invalidated. Twenty-three statutes were in effect for three years.

There can be little question about the undesirable effects occurring in some of these instances of having a statute held invalid after the expiration of so many years. The legal problems incident to this situation have in recent years been to the fore; the time elapsing in some of the New Deal cases was relatively short, but even in some of them troublesome legal problems resulted.

It is interesting to note that no statute of limitations is applicable as such to actions involving constitutional litigation, and it is an interesting question whether such a statute would be constitutional in the eyes of the courts. There is much to be said in favor of some time limitation in this field of litigation. The courts themselves could, of course, work this out by either rules of practice or judicial decision.

On the basis of the small sample of cases in which it was possible to get the date of *initial action*, it is interesting, though not conclusive, to note that the number of months required to settle the litigation in four cases exceeded 48, that in one case 36 months were required, that between 12 and 17 months were required in nine cases. It should not be necessary to point out the public interest in having constitutional questions settled speedily once they are raised, in so far as that can be done consistently with careful judicial consideration.

III

What were the forms of action used in bringing the question of constitutionality into court in those cases in which the court decided that the statutes were unconstitutional? The following table lists the types of action, with the number of cases in which each was used. The cases do not fall into exactly the categories that might be expected if the old common law actions were to be the basis of classification. In some instances under

Type of Action	*No. of Cases*	*Type of Action*	*No. of Cases*
Equity	2	Action to enforce lien	4
Trespass	1	Damages	9
Mandamus	33	Prohibition	2
Debt	17	Action to try title	3
Foreclosure	1	Action to collect insurance	3
Redemption	1	Partition of realty	2
Sale on execution	1	Habeas corpus	6
Cancel tax levy	1	Divorce	1
Injunction	25	Writ of ouster	1
Ejectment	9	Statutory violation	8
Conveyance of land	1	Receivership	1
Eminent domain	34	Liquor law prosecution	1
Polygamy	1	Probate of will	1
Unlawful assembly	1	Election contest	2
Conversion	3	Recovery of money	2
Tax refund	1	Special assessment	1
Obstructing highway	1	Ditch proceeding	1
Stockholder's liability	2	Action to create school district	1
Quo warranto	12	Disbarment	1
Attachment	1		

modern codes of procedure, all that can be done is to name the general subject-matter as it was set forth in the bill for relief or the complaint or indictment.

A few points in this list are worthy of notice. Types presenting most cases are quo warranto, eminent domain, debt, mandamus, and injunction. In general, this would tend to emphasize that in this field relatively large numbers in the list of unconstitutional statutes dealt with problems of public officers, property, and business. Habeas corpus does not rank high, suggesting that the number of invalid statutes assailed on the ground that they interfered with personal liberty was relatively small, or that personal liberty was represented in other forms than those historically associated with habeas corpus, and is to be found hidden in ejectment, mandamus, injunction, or quo warranto.

In breaking down the experience with injunction, the cases were arranged by decades, and the results are as follows:

Decade	*No. of Cases*	*Decade*	*No. of Cases*	*Decade*	*No. of Cases*	*Decade*	*No. of Cases*
1860–69	1	1880–89	3	1900–09	6	1920–29	6
1870–79	1	1890–99	3	1910–19	3	1930–33	2

It is interesting to notice that in the periods when more unconstitutional statutes were being discovered by the bar and bench, the use of injunction was more general. Injunction was as effective in the first decade of the century as in the third. There has been no steady increase of the use of this remedy in Minnesota in this class of cases. Legislation in the state restricting the use of injunction in certain phases of taxation and labor cases may account for some of this, but a breakdown of subject-matter in this connection is interesting. It shows that injunction in Minnesota in cases involving unconstitutional legislation is not limited to any particular class of cases. It is neither the remedy of any particular group of litigants nor the remedy for any particular class of cases. Running through a group of injunction cases, one finds that it has been sought to prevent a change in election dates, to prevent the enforcement of a law governing the wrapping of bread, to prevent the dissolution of a school district, to prevent street improvements, park purchases, diversion of bridge funds, establishment of county offices, special assessments, removal of county seats, tunnel construction, application of special legislation, and elections on bond issues. The interested parties in these instances were very often divided along local lines, rather than along the lines of rich and poor, Republican and Democrat, private citizen and corporate person. In some instances, they represent divisions based upon differences in local areas.

One point does appear rather clearly in reading these injunction cases, and that is that injunction is often used in cases in which feelings run high on both sides. Visualize, for instance, the local fight over a waterworks project, or that over the moving of a county seat. Similarly, the amount of partisan feeling that can be engendered by an election of a school board at a time and in a manner open to controversy can be realized only by those who have witnessed this type of thing. It is easy in our modern industrial society with large cities to read into such illustrations lines of cleavage which did not actually exist at the time or in the place. A group of business men and the local bankers want the streets paved. The retired farmers who are the bulk of residents of the village are opposed to the improvement. Which group is conservative and which radical?

IV

A complete tabulation of the subjects with which invalid statutes have dealt reveals that a few subjects account for a great many statutes. The subjects involving more than 10 statutes are (1) counties, (2) courts, (3) officers, (4) municipal government and municipalities, and (5) taxation. Taxation, with 32 invalid statutes, leads the list. Those subjects about which more than five but less than 10 statutes were declared invalid are (1) appropriations, (2) corporations, (3) crime and punishment, (4) drainage, (5) eminent domain, (6) estates, (7) licenses, (8) mortgages, (9) property, (10) roads and bridges, (11) railroads, schools, and school districts, (12) police power, and (13) persons.

In studying the figures on the subjects with which statutes dealt, it is interesting to notice that the personal liberties emphasized so much in Anglo-American law were disturbed with relative infrequency by the Minnesota legislature, or else if the legislature did disturb them the statutes were not challenged successfully. The subjects with which most litigation in this field dealt were largely (1) taxation, (2) governmental structure and arrangements, and (3) property and the regulation of business. This, of course, does not mean that the older procedural rights and personal rights are not as important now as they formerly were, but it means that instead of jury trial, freedom of speech, search and seizures, the scene has shifted to other areas. This shift is reflected in the foregoing listing of subjects. Classes one and three above do involve private rights, real or fancied, and they represent the new fields of controversy in our society. The increase in governmental functions and the changing relationships between government and business, with their accompanying differences of opinion, are clearly reflected in this classification.

V

What are the constitutional obstacles or provisions encountered by legislative enactments in Minnesota? What were the chief constitutional obstacles which the legislature failed to hurdle? Again, to begin with those involving 10 or more unconstitutional statutes, it appears that the following loom as the most important; (1) obligation of contract, with 11; (2) procedural rules governing the enactment of laws, with 87; (3) due process of law, with 32; (4) federal-state relations, with 11; (5) taxation, with 26; (6) eminent domain, with 10.

Stated in terms of articles and sections, the major obstacles encountered by the Minnesota legislature have been Article I, section 7, due process; Article I, section 11, obligation of contract; Article III, section 1, government; Article I, section 13, eminent domain; Article IV, section 26, laws, procedure and subject (including special and local laws); Article IX, sections 1 and 3, taxation.

Again it is striking to observe to what an extent legislatures have encountered difficulties connected with the structural and procedural arrangements relating to governmental organization and functioning. In this connection, it is somewhat surprising to find federal-state relations having assumed such an important place in the period here under review. Property cases are apparent in obligation of contracts and in some phases of due process, but they are to be found also under the heading of taxation, with respect to both procedure and substance.

VI

At this juncture, it seemed of interest to raise the question of the extent to which unconstitutional statutes in Minnesota were challenged by corporations. The feeling is common that corporations have been partially responsible for the increase in constitutional litigation, and that they are particularly successful in their litigation in this field. Arranging the cases in which it appeared that a corporation was the plaintiff, the following figures stand out:

Years	*Corp. Pl.*	*Corp. Pl. or Def.*	*Years*	*Corp. Pl.*	*Corp. Pl. or Def.*
1860–69	1	2	1900–09	3	6
1870–79	2	4	1910–19	1	4
1880–89	1	5	1920–29	5	8
1890–99	2	10	1930–33	3	4

When, however, cases in which corporations were either party plaintiff or party defendant are added, as they are above, the picture looks somewhat different. Then, the right-hand column of figures that are added tends to show that more cases involved corporations as time went on.

It is, of course, only natural that corporations should appear more frequently as litigants in this field during this period, because they were increasing in number very rapidly. The number of statutes dealing with corporations as such, and with subjects and operations in which corporations were interested, was also increasing rapidly. It is not to be taken as evidence of a pernicious influence, necessarily, because some of the early attempts in this field were rather blundering.

An analysis of the contents of the statutes involved in the cases to which corporations were parties fails to indicate any particular correlation between the corporations as parties and the subjects with which the statutes dealt. The subjects were of the same variety as were those involved in the cases at large. In a few, but in a surprisingly few, cases did the statutes affect corporations as such. Nor did the statutes often deal with subjects of any particular economic or social significance related to the interests of corporations. The author confesses to a little surprise at this finding, but believes that the figures bear out his conclusion. The data from the other states examined, such as Indiana, confirm the conclusion.

VII

One of the subjects bulking large in recent legal literature is the objectivity or subjectivity of judges in passing upon constitutional questions. Some have taken the position that, when they sit in constitutional cases, judges are likely to act, not as lawyers, but as laymen. Others maintain that the same general attitudes that characterize the common law judges and their techniques are to be found in operation in this field of litigation as in others. What has the experience of Minnesota been with respect to this issue?

The outstanding fact about decisions in the Minnesota supreme court in constitutional litigation is that most of them are rendered by unanimous vote. Out of a total of 194 cases, a unanimous decision was rendered in 176. The number of cases in which the judges of the supreme court did not vote unanimously is relatively small, perhaps somewhat smaller, proportionately, than in some of the other states. Twenty cases have been tabulated in which one or more judges dissented. In only seven cases was the decision of the court by a bare majority. When these are examined, it appears that in two of them the court was composed of three judges, so that if they did not all agree the decision had to be by a bare majority. In five cases, there were three judges on one side and two on the other. The subjects dealt with in these cases have no common pattern running through them, ranging from courts and county government to commerce and cities.

When all the cases involving dissents are examined and arranged by subjects, it is likewise apparent that it has not been the basic economic or political issues of our history that have divided the judges. One or two instances of this can be found, but the striking thing is that the subjects are of a nondescript character, e.g., licenses, commerce, taxation, hours of work, drainage ditches, elections, counties, cities, and liquor.

One point, however, is worthy of notice. It is that the period of time elapsing between the enactment of the statutes involved and the decisions in the supreme court was somewhat shorter, on the whole, than in the other cases. This means, doubtless, that there was some point of immediate controversy involved, and that this was brought to a test early. At first glance, this might seem to fit in with the conclusion often drawn in legal literature that the basic economic and political issues are those which divide the courts. But one familiar with this type of litigation will remember that lawyers contest hotly and immediately changes of their own rules of procedure, that neighboring farmers are as likely to fight about laws of drainage as they are to fight with the contractors who are thought to be the major beneficiaries of some of these projects, and that local governmental affairs often create a high pitch of feeling reflected in immediate resort to the courts.

The judges of the Minnesota supreme court have perhaps divided less often in their opinions than have those of many other states. The reasons for this unanimity of the court in the great majority of its opinions may be several. The tradition of electing judges to succeed themselves doubtless has played its part, giving a continuity of membership that is not found in all state courts. The introduction of the nonpartisan ballot for judges during the past generation may have aided to some extent, but the tradition was established earlier than that movement. The active participation of the bar in nominating and electing judges may have resulted in focusing attention upon lawyer-like qualities so that the members of the court have thought as judges rather than as laymen upon constitutional questions. The bar may have been responsible to some extent by presenting constitutional issues to the court in sufficiently clear fashion to make it relatively easy for the judges to reach their decisions.

It is obvious that in Minnesota the problem of decisions by a bare majority has not been presented in serious form. The generalization seems well founded that in Minnesota the judges think surprisingly alike on constitutional matters. This is not to suggest that every time a united front is presented each and every one of the judges agrees precisely with each and every other judge. But it does mean that, even though there be differences, the judges in most cases do not consider them of sufficient importance to justify a dissent. There have been dissents, but there have not been so very many of them. Minnesota judges, it may be said, do not dissent lightly. This is as it should be.

VIII

The length of judicial opinions is a subject that may seem at first thought to have little significance, but it may bear a direct relationship to the value of opinions in guiding the bar in its use of precedents. If an opinion is too long because the judge writing it was confused in his own mind, and his brethren were lenient with him, the law suffers. An opinion may be so brief that it is almost impossible to tell what principle of law is to be deduced from the decision. In general, it is the quality of the opinion that is primary; but it is not to be overlooked that the length of an opinion may be a fairly good index to its quality. There are few very long judicial opinions that are fine, so far as the experience of this reader is any basis for judgment.

The average length of majority opinions in the Minnesota cases is just under six pages. In 156 cases, the opinions were 10 pages in length or less. In only 11 cases were they more than 12 pages long. The tradition of the Minnesota court may be said, on the basis of this experience, to be to write relatively short opinions—opinions of about the right length. They should not be lengthened. If anything, they should be shortened. This author, on the basis of his reading, is inclined to appraise the quality of constitutional opinions in Minnesota as above the average, taken as a group.

IX

The Minnesota decisions were not, of course, rendered in the first instance by the highest court of the state. The trial courts are the ones first faced, in most instances, with the question of the constitutionality of a legislative act. How reliable are these courts in their judgment of the validity of a statute, using their anticipated conformity with the supreme court as the test of their reliability?

About one-third of all the Minnesota cases studied in which the supreme court held the statute to be unconstitutional were held by the district courts to be constitutional. This means that the trial courts are more likely to hold statutes constitutional than is the supreme court; and this is as it should be. The Minnesota trial courts are, however, somewhat more forthright in their exercise of the power to declare statutes invalid than those of Indiana and some other states, where in some instances half of the statutes are held valid which later are declared invalid by the highest court of the state.

The Minnesota bench, in the trial courts, may have a greater stability than that of some of the other states, because of the combination of nonpartisan elections and the tradition of reëlecting the sitting judge in the district court, just as in the supreme court. The endorsement of the bar likewise assists in making more certain that the trial judge is not only a type of person with whom the bar likes to work, but that he is a competent lawyer before whom they are satisfied to present their legal issues. The number of reversals, while smaller than in some of the states studied, is nevertheless large enough to make it necessary to keep the doors open to the highest court in constitutional cases. An analysis of the subjects with which the statutes dealt in those cases in which the highest court reversed the lower court on this point does not show that there is any particular correlation between reversals and any type of subject. The subjects involved range over the entire scope involved in the total group of cases.

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L. 1893, cc. 225–26, Wm. Deering & Co. v. Peterson, 75 Minn. 118 (1898)
L. 1895, c. 205, Minn. Sugar Co. v. Iverson, 91 Minn. 30 (1903)
L. 1921, c. 355, Sundquist v. Fraser, 154 Minn. 371 (1923)
Section 13:
L. 1885, c. 155, Palmer v. Bank of Zumbrota, 72 Minn. 266 (1898)
Section 16:
L. 1905, cc. 91 & 505, Cooke v. Iverson, 108 Minn. 388 (1909)
Article 10, Section 3:
L. 1876, c. 28, Anderson v. Anderson Loan Co., 65 Minn. 281 (1896)
Article 11, Section 5:
L. 1877, c. 106, s. 7, Harrington v. Town of Plainview, 27 Minn. 224 (1880)
Article 16: (Amendment)
L. 1923, c. 358, State *ex rel.* Morrison Co. v. Babcock, 161 Minn. 80 (1924)
Section 2:
L. 1929, c. 394, State *ex rel.* Wharton v. Babcock, 181 Minn. 409 (1930)
Section 3:
L. 1927, c. 12, Am. Ry. Expr. Co. v. Holm, 173 Minn. 72 (1927)
L. 1929, c. 361, Ry. Exp. Agency Inc. v. Holm, 180 Minn. 268 (1930)

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Fourth Edition of the Model State Constitution. After two years of effort, the Committee on State Government of the National Municipal League has completed its work on the new fourth edition of the Model State Constitution. This constitution was originally published in 1921, and revisions were made in 1928 and 1933. The form of the constitution has been improved, and the text itself subjected to a thoroughgoing revision, resulting in many important changes. Whereas the third edition had ninety-eight sections, the new one has 116 sections grouped under thirteen articles, dealing respectively with the bill of rights, suffrage and elections, the legislature, initiative and referendum, the executive, the judiciary, finance, local government, the civil service, public welfare, intergovernmental relations, constitutional revision, and the schedule. The explanatory comments have been thoroughly revised and rewritten.

The Committee was mindful of the fact that the states differ greatly in size, wealth, and population, as well as in governmental traditions and practice, and that provisions on many subjects may properly vary in accordance with these factors. It tried to look ahead, to plan for the future, without losing sight of the practical. Essential features that have characterized earlier editions of the document have all been retained, but in some cases with modifications made necessary by recent developments. In the bill of rights, new sections have been added on legal rights and on the right to organize, and another designed to prevent raids upon the public treasury by interest groups. The provisions on suffrage and elections have been entirely redrafted, in the light of recent experience as shown by scientific studies of electoral procedure.

With regard to the legislature, the Committee continues to believe that "a single body, chosen by proportional representation and not too large in number, will be at once more representative and efficient than the present two-chamber system." It recognizes, however, that the unicameral legislature will probably not be adopted in many states in the near future, and that in fact we have no assurance that this form would prove suitable in some of the larger and more populous states. The major changes affecting the legislature are three in number: (1) the legislative process is made a continuous one; (2) the legislative council is strengthened as an agency of the legislature; and (3), emphasis is given to the improvement of committee procedure. The Committee was of the opinion that, from the point of view of protecting and strengthening the machinery of the democratic process, nothing is more important than the improvement of legislative procedure. Although the provisions on the initiative and referendum in the earlier edition were generally satisfactory, some changes were thought desirable. These were designed to make the provisions more specific, to eliminate confusion or conflict, and to include some new restrictions and safeguards.

The new edition continues to stand firmly for the principle of concentration of administrative responsibility in a single popularly elected executive. Recognizing the limitations imposed by the "span of control," the effort has been made to restrict the number of departments without imposing unreasonable or improper limitations upon the power of the legislature to make such changes in the administrative set-up as may from time to time seem desirable. Formal recognition is given to the need for management in a new provision for an administrative manager of state affairs and for such administrative aides as may be required to assist the governor in his task of administrative supervision. For the present, it is suggested that these might include a financial assistant, a personnel assistant, a planning assistant, an assistant in the field of research and statistics, and an assistant in charge of public reporting and information—although, in keeping with the Committee's policy of excluding the names of particular administrative officers from the constitution, these positions are not mentioned by name. The governor is to be elected, still for a four-year term, in alternate odd-numbered years. To insure the focusing of public attention on the actions of the governor, it is provided that executive orders shall be published before they become law—a safeguard on the administrative process which has been generally overlooked in state government.

Unification is the keynote of the judiciary article of the new edition. It provides for a general court of justice to perform all of the trial and appellate judicial functions of the state. The chief justice is made the executive head of the judicial department and is responsible for its efficient organization and smooth functioning. He is assisted by a judicial council representing all parts of the judicial system. Since the chief justice and the judicial council would provide a continuous supervision of the judicial agencies, they can be freed from frequent sporadic meddling by political officers. Thus a real independence of the judiciary is secured—an aim long lauded as an ideal, only to be flouted in practice. The organization is flexible; the council is vested with the rule-making power. The chief justice is popularly elected; he selects the judges, from a panel of names recommended to him by the council, for a term of twelve years. Each judge is subject to an automatic recall election at the expiration of one-third of this term.

The article on finance is intended to include all provisions relative to state finance and financial procedure that the Committee deemed it necessary to write into the constitution. These provisions related to general taxing and borrowing powers, debt limitations, budgeting, expenditure control, purchasing methods, post-auditing, and excess condemnation. Such items as accounting procedures are not covered; their necessity is taken for granted, and it is assumed that they may be adequately provided for by statute. The provisions of this article seek to make effective the principles of administrative organization established in the article on the executive. In conformity with the trend of recent years, the financial functions would probably be integrated in a department of finance. The governor is made responsible for submitting to the legislature a comprehensive budget. He is given power to require estimates and other information from all spending agencies of the government; the procedure to be followed is outlined, and the resulting appropriation bill is given priority in the legislature. The governor is given authority to reduce expenditures under appropriations, when in his judgment, it is necessary or desirable, and through allotments or otherwise, to control the rate at which appropriations are expended during the fiscal year. There is a provision to encourage centralized and coöperative purchasing, and for an effective post-audit.

The article on local government, which continues to emphasize the principle of home rule, has not been greatly changed. The provisions on civil service were drafted at a joint meeting of committees representing the National Municipal League, the Civil Service Assembly of the United States and Canada, and the National Civil Service Reform League. The effort was made to include the entire civil service of the state and its political subdivisions, including legislative and judicial employees as well as those in the executive branch of the government. A department is made responsible for the classification of positions, the establishment of salary ranges, the establishment of rosters, and the general administration of the personnel functions. Counties and municipalities which prefer to operate their own personnel agencies may do so, under state supervision; otherwise they are subject to the jurisdiction of the department.

The provisions on public welfare, which have been considerably revised, seek to outline a general framework of constitutional powers which will guarantee to the state ample authority to establish and maintain an effective program of public welfare services in the fields of education, health, public assistance, inspection of welfare institutions, housing, and conservation. In order to prevent the possibly unfortunate effects of a narrow judicial construction of these provisions, it is specifically provided that "the enumeration in this article of specified functions shall not be construed as a limitation upon the powers of the state government."

The article on intergovernmental relations is largely new, and grows out of the experience of recent years. Its provisions seek to eliminate constitutional barriers to federal-state and interstate coöperation, and to encourage the consolidation and coöperation of local units. The provisions governing the legislative proposal of constitutional amendments have been revised to conform to the idea of continuous legislative activity. The people are given the right to vote on the question of a constitutional convention at least once in twenty years, and the provisions with regard to the number and choice of convention delegates have been redrawn. It is provided that the provisions affecting constitutional amendment and revision shall be self-executing, but that the legislature may adopt legislation to facilitate their operation. A schedule has been added to provide for the transition from the old constitution to the new.

In view of the long period of constitutional stagnation that has afflicted the American states, it is to be hoped that the publication of this new edition of the Model State Constitution will stimulate interest and activity in this field. There are hopeful signs in the recent conventions in New York and New Hampshire, and the current interest in constitutional conventions in New Jersey and Missouri.

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Organization of the Executive Branch of the National Government of the United States: Changes between April 1 and July 15, 1941.[1] As in previous lists, mention is here confined generally to units specifically authorized by law or established by the President by executive order or reorganization plans under general authority vested in him. Changes in units created by heads of departments or independent establishments are excluded unless of major importance.

Bituminous Coal Division, Department of the Interior. Functions continued until April 26, 1943, by Public Law 34, 77th Congress, approved April 11, 1941. This unit was established as the Bituminous Coal Commission by the act of April 26, 1937 (50 Stat. L. 72), which expired by limitation on April 26, 1943. The Commission was abolished by Reorganization Plan No. 2, effective July 1, 1939, which transferred its functions to the Secretary of the Interior, who in turn established the Bituminous Coal Division.

Board of Legal Examiners of the Civil Service Commission. Appointed by the President on June 18, 1941, in accordance with the provisions of Executive Order 8743 of April 23, 1941, to determine the manner by which the Civil Service Commission shall establish registers for the appointment of attorneys, and to promote the development of a merit system for the recruitment, selection, promotion, and transfer of attorneys in the classified civil service. The Board consists of the Solicitor General of the United States, the Principal Legal Examiner of the Civil Service Commission, and the following appointed members: two from the law-teaching profession, two from attorneys in private practice, and five from the chief law officers of the executive agencies.

Committee on Fair Employment Practice. Created in Office of Production Management by Executive Order 8802 of June 25, 1941, to receive and investigate complaints of discrimination in employment by reason of race, creed, color, or national origin. The Committee consists of a chairman and four other members to be appointed by the President. Executive Order 8823 of July 18, 1941, provided for an additional member. The order provides that all government agencies concerned with defense production shall take special measures to prevent discrimination, and that all contracting agencies shall include in all defense contracts a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin. The Committee is directed to recommend to the several agencies and to the President all measures deemed necessary or proper to effectuate the order.

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[1] Articles of this character appearing in the REVIEW prior to 1940 are listed on page 1044 of the issue for December, 1939. Later articles have appeared in the issues for June and October, 1940, and February and June, 1941.

Department of Commerce Field Service. Established by the Secretary of Commerce by order of May 26, 1941, by consolidation of the field offices of the Bureau of the Census and the Bureau of Foreign and Domestic Commerce. The plan provides for 12 regional offices—one in each Federal Reserve District and 19 district offices in other cities. The manager of each regional office will supervise the district offices in his territory. General supervision will be exercised by the Department of Commerce Field Service Office in Washington.

Disaster Loan Corporation. Functions extended by Public Law 108. 77th Congress, approved June 10, 1941, to include floods and other catastrophes that may occur prior to January 22, 1947.

Division of Defense Aid Reports. Established in Office of Emergency Management by Executive Order 8751 of May 2, 1941, to provide a central channel for clearance of transactions and reports, to maintain a system of records and summary accounts, to prepare reports for the President, and to serve as a clearning house of information. By military order of May 6, 1941, an officer of the army was designated as executive officer of the division, as the functions assigned to it "are essentially of a military character."

Division of Power, Department of the Interior. Created by the Secretary of the Interior on April 18, 1941, to have supervision over all functions in connection with electric power matters in the Department of the Interior and to coördinate power policies and activities within the Department and with other agencies dealing with power.

Electric Home and Farm Authority. Functions continued to January 22, 1947 by Public Law 108, 77th Congress, approved June 10, 1941.

Maritime Labor Board. The life of this board expired by limitation on June 23, 1941, but Public Law 124, 77th Congress, approved June 23, 1941, extended it to June 23, 1942. The duties of the board as regards mediation and arbitration are repealed, but it may continue to act as mediator if its mediation has been requested and actively undertaken prior to June 23, 1941.

National Archives Trust Fund Board. Created by Public Law 161, 77th Congress, approved July 9, 1941, to receive gifts for the National Archives and to administer the fund derived therefrom. The Board consists of the Archivist, the chairman of the House Library Committee, and the chairman of the Senate Library Committee.

Office of Agricultural Defense Relations, Department of Agriculture. Ordered established by the President on May 5, 1941, in a letter to the Secretary of Agriculture to succeed the Division of Agriculture of the National Defense Advisory Commission. The duties of the office are to serve as a clearing house for agricultural needs as they relate to defense, to facilitate the coördination of defense operations carried on by the Department of Agriculture, to assist the Secretary in maintaining effective channels of communication between the Department of Agriculture and the several defense agencies with respect to problems of procurement, production, priorities, price, and other activities involving agricultural considerations, and to assist in the planning of adjustments in the agricultural program in order to meet defense needs.

Office of Bituminous Coal Consumers' Counsel. Established as an independent establishment by Public Law 34, approved April 11, 1941. The Bituminous Coal Act of 1937 (50 Stat. L. 72) established in the Department of the Interior the Office of Consumers' Counsel of the National Bituminous Coal Commission. By Reorganization Plan No. 2, effective July 1, 1939, the office was abolished and its functions were transferred to the Office of the Solicitor of the Interior Department. On July 7, 1939, the Secretary of the Interior established the Consumers' Counsel Division in the office of the Solicitor. The act of April 11, 1941, confers on the Office of Bituminous Coal Consumers' Counsel all functions conferred on the Office of Consumers' Counsel of the National Bituminous Coal Commission as specified in the act of April 26, 1937 (50 Stat. L. 74).

Office of Coördinator of Information. The position of Coördinator of Information was established by the President July 11, 1941, "by virtue of the authority vested in [him] me as President of the United States, and as Commander in Chief of the Army and Navy of the United States," to collect and analyze information on national security, and to make such information available to the President and such agencies as the President may determine.

Office of Civilian Defense. Established in the Office of Emergency Management of the Executive Office of the President by Executive Order 8757 of May 20, 1941. The duties of this unit are to coördinate, plan, and promote activities relating to the protection of life and property in the event of emergency. The Office is headed by a Director, who serves without compensation. Within the unit are a Board for Civilian Protection and a Volunteer Participation Committee, to function as advisory bodies and to serve without compensation. The Board for Civilian Protection consists of the Director of Civilian Defense as chairman, one representative each from the War, Navy, and Justice Departments and the Federal Security Agency, and such others as the President may from time to time determine; the following organizations are also to be invited to designate a member: the Council of State Governments, the American Municipal Association, and the United States Conference of Mayors. By Executive Order 8822 of July 16, 1941, the American National Red Cross was added to the organizations authorized to designate a representative on the Board. The Volunteer Participation Committee is to consist of the Director of Civilian Defense as chairman, and representatives of the "various regions and interests of the nation," to be appointed by the President. The number of representatives was fixed at 20 by Executive Order 8757, but was increased to 45 by Executive Order 8799 of June 20, 1941.

Office of Government Reports. Annual appropriations not exceeding $1,500,000 authorized by Public Law 107, 77th Congress, approved June 9, 1941. While the act of June 9 does not specifically establish this unit, it does so in effect by authorizing annual appropriations. Originally, this office was the National Emergency Council, created by Executive Order 6433A of November 17, 1933, and abolished by Reorganization Plan No. 2, effective July 1, 1939, which transferred part of its functions to the Executive Office of the President. By Executive Order 8248 of September 8, 1939, the Office of Government Reports was established in the Executive Office of the President; to it were assigned the functions of the National Emergency Council that had been transferred to the Executive Office. Heretofore the funds for this office have been provided by allocations from emergency relief acts.

Office of Petroleum Coördinator for National Defense. Created by the President May 28, 1941, in a letter to the Secretary of the Interior, who is designated as Coördinator. The duties are to obtain information regarding needs for petroleum and petroleum products, and to make recommendations to appropriate federal agencies as to action which is necessary or desirable to insure the maintenance of a ready and adequate supply of petroleum and petroleum products.

Office of Price Administration and Civilian Supply. Established in the Office of Emergency Management of the Executive Office of the President by Executive Order 8734 of April 11, 1941, and to be headed by an Administrator appointed by the President. The duties of the officer are to take necessary steps to prevent price spiraling, to prevent speculative accumulation, to stimulate production of commodities for civilian use, to provide for equitable distribution among competing civilian demands, to make studies of civilian requirements, to determine maximum prices, and to recommend to the President the exercise of the authority vested in him by existing law.

There is also created in the Office of Price Administration and Civilian Supply a Price Administration Committee consisting of the Administrator as chairman, the Secretary of the Treasury, the Secretary of Agriculture, the Federal Loan Administrator, the chairman of the Tariff Commission, the chairman of the Federal Trade Commission, the Director-General and the Associate Director-General of the Office of Production Management, or such alternate as each of the above listed may designate, and such other members as the President may subsequently appoint. The Commission shall from time to time, upon request of the Administrator, make findings and submit recommendations regarding maximum prices.

Office of Scientific Research and Development. Established in the Office of Emergency Management of the Executive Office of the President by Executive Order 8807 of June 28, 1941, to advise the President with regard to the status of scientific and medical research relating to national defense, to serve as a center for the mobilization of scientific personnel, to coördinate experimental and other scientific and medical research, to develop plans for the conduct of scientific research, to initiate and support scientific research on mechanisms and devices of warfare and on medical problems affecting the national defense, to promote such scientific and medical research as may be requested by any country whose defense the President deems vital to the defense of the United States under the terms of the act of March 11, 1941 (Public Law 11, 77th Congress), and to serve as the central liaison office for such work. At the head of the office is a director appointed by the President.

Within the Office of Research and Development are the following advisory units:

(1) National Defense Research Committee, consisting of a chairman and three other members appointed by the President, the President of the National Academy of Sciences, the Commissioner of Patents, an officer of the Army designated by the Secretary of War, an officer of the Navy designated by the Secretary of the Navy, and such other members as the President may subsequently appoint. This Committee is to recommend to the Director the need for and character of contracts to be made with universities, research institutes, and industrial laboratories. The National Defense Research Committee established by the Council of National Defense on June 27, 1940, is abolished.

(2) Committee on Medical Research, consisting of a chairman and three members to be appointed by the President, one member each from the medical staffs of the Army, the Navy, and the Public Health Service, to be designated respectively by the Secretary of War, the Secretary of the Navy, and the Administrator of the Federal Security Agency. This committee shall advise the Director in regard to the mobilization of medical and scientific personnel, and shall recommend the need for and character

of contracts to be made with universities, hospitals, and other agencies conducting medical research activities. The duties pertaining to medical research of the Health and Medical Committee created by the Council of National Defense on December 28, 1940, are transferred to the Office of Scientific Research and Development.

(3) An Advisory Council consisting of the Director as chairman, the chairman of the National Advisory Committee for Aeronautics, the chairman of the National Defense Research Committee, the chairman of the Committee on Medical Research, and one representative each from the Army and the Navy to be designated by the Secretaries of War and Navy. The Council shall advise and assist the Director with respect to the coordination of research activities carried on by private and governmental groups.

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JUDICIAL AFFAIRS

The Judicial Council as an Aid to the Administration of Justice.[1] Procedure is the most difficult and the least satisfactory part of the law. It is the delay, expense, and uncertainty of litigation that has always aroused popular complaint; and these are mostly matters of procedure.

Our substantive law, regulating rights and duties, is intricate enough, but on the whole it has been worked out by the courts and laid down in statutes in a way which seems to meet the general needs of society. The principles of property law, contracts, torts, trusts, agency, partnership, corporations, negotiable instruments, sales, and of all the other titles in the substantive field, are quite acceptable to the public. But when the machinery of the courts is invoked to administer these principles, interminable trouble results. Process must be issued and served to bring persons and property under the jurisdiction of the court, the parties must file their claims and defenses, objections must be heard and amendments made, evidence must be collected by various devices. When the case is called for trial, the jury must be empanelled, opening statements must be made to the jury, proof must be introduced, the jury must be addressed by counsel and instructed by the court, and the verdict must be taken, after which motions for a new trial are likely to be made on account of alleged errors occurring in the course of the trial. After the judgment is rendered, proceedings for appeal are in order, requiring the careful preparation of a record which will bring before the reviewing court all the matters on which a reversal is claimed, the filing of briefs, and arguments to the court. All these proceedings involve an indefinite maximum and an irreducible minimum of technical requirements, and constitute the basis for most of the complaints against the administration of justice.

The chief problem of the judicial branch of the government is to make this intricate mechanism operate with the least possible friction. This requires an adequate system of procedural rules. The earliest rules of procedure were developed by the courts as a mere by-product of litigation. When a matter came before the court for the first time, it had to be dealt with in some way, and it was natural for the method employed in that case to be followed in succeeding cases. But the difficulty with this system was that the doctrine of *stare decisis*, which made every decision operate as a binding precedent, produced a rigidity in the rules which greatly diminished their effectiveness.

To introduce into the rules of procedure sufficient flexibility to enable them to meet the changing needs of society, legislatures undertook the task of devising procedural codes. But this was not wholly successful, for while legislative bodies are not at all bound by precedents, because the very reason for their existence is the admitted need for constant changes in the law, yet they are largely made up of laymen who do not understand legal procedure, and their attention is diverted by the pressure of other matters having a stronger social or political appeal. If the legislature is to function effectively in the somewhat dry and technical field of legal procedure, not only must it obtain technical advice from those having experience and skill in the administration of justice, but there must also be some sort of organized sponsorship for proposed reforms to secure for them a favorable place on the legislative agenda.

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[1] Both this article and the following one originated as papers presented in the round table on judicial administration at the Chicago meeting of the American Political Science Association, Dec. 30, 1940.

As a means of escape from the infirmities of both of the foregoing methods of regulating procedure, a third plan has been strongly advocated. This is regulation by rules of court. It is obvious that the judges are entirely familiar with the problems involved and are more directly interested than the legislature in the successful operation of the courts. This would seem, therefore, to be an ideal solution of the problem.

But experience has shown that even this plan has fatal weaknesses. The judges are too much occupied with the pressing demands of the cases which come before them. This is their principal responsibility and their primary interest. If clothed with rule-making power, they simply do not exercise it.

Furthermore, judges are normally disinclined to change the rules under which they operate their courts. The judiciary is the element which conserves; it does not create. It follows precedent. Its primary function is to administer the law as it is. The courts are the stabilizing factor in our civilization, and we want them to remain so. It is their task to maintain and protect our social organization. To point out that the court lacks incentive to develop new rules of procedure, because of a judicial attitude which accepts the established order, reflects no criticism upon the court. We need exactly that kind of a judicial institution. But it does not follow that the court is the best qualified agency to carry out procedural reforms.

Furthermore, the courts are fully occupied with other duties which are always urgent. Their main function is the strictly judicial one of deciding cases and determining the law, and that function is of paramount importance. Cases press upon the court and occupy substantially all the time and attention of the judges. They have no opportunity for research in the field of procedure. Besides, no non-competitive organization will ever voluntarily change its routine. Why should it? It gets familiar with its own methods, there is no pressure of competition, it does not have to change in order to perform its functions. Why should it not be content to continue in its accustomed way? Perhaps it should; at least it usually does.

Here are some actual results of American grants of rule-making power: *United States Supreme Court.* Given power to make equity rules in 1792. Nothing was done for thirty years, when the first rules were drawn. Twenty years later, a few amendments were made and nothing was done thereafter for seventy years.

Virginia Supreme Court of Appeals. Given rule-making power in 1916, the act providing that the court "shall" make rules of procedure. The court did nothing, and two years later the act was amended by changing "shall" to "may." Still nothing happened. In 1928, another statute was passed with the same purpose in view, as a result of which the court adopted one rule.

Alabama Supreme Court. Was given rule-making power in 1913. Nothing was ever done with it.

New Jersey Supreme Court. Power was conferred in 1912 to make rules of court, but it has been practically unused.

England has had a similar experience. The English Civil Procedure Act of 1833 was the first effort during the last century to delegate to the courts the task of regulating judicial procedure. It resulted in the famous Hillery Rules of 1834. But they were not a success. They did not go far enough. The judges did not understand what was wanted. Reform was outside of their normal field of activity. They lacked creative imagination. They were not in touch either with the clients or with the public, and the rules they produced were not satisfactory.

Years went by with increasing discontent, and after another half-century of struggle came the judicature acts of 1873 and 1875. What did Parliament do? Did it pass a brief enabling act and say to the courts: "Draw up the rules?" On the contrary, Parliament itself drew up the rules. It passed the statute to which was attached a complete schedule of rules of practice. It did, however, give to the judges the power to change that schedule at any time they saw fit. This was a delegation to the court of full control over the rules, and on paper it provided a flexible scheme for adjusting procedure from time to time as the public need required.

But the plan was a failure. Nothing was done by the judges. In 1913, a royal commission was appointed to see what was wrong. Many witnesses were examined, including judges and lawyers and business men. In its report, after making a large number of specific suggestions for changes in organization of courts, their methods of administration and their procedure, the Commission said:

"The question may be asked why the delays in the administration of justice which have been so long complained of could not have been remedied by the adoption of these proposals by the responsible authorities through the procedure already provided without recourse to a Royal Commission. We regret to say that we do not think a satisfactory answer can be given to this question.

"Section 75 of the Judicature Act, 1873, enacts that a Council of the Judges of the Supreme Court, of which due notice shall be given to all the said judges, shall assemble once at least in every year on such day or days as shall be fixed by the Lord Chancellor with the concurrence of the Lord Chief Justice of England, for the purpose of considering the operations of this Act and of the Rules of Court for the time being in force, and also the working of the several offices and the arrangements relative to the duties of the officers of the said Courts respectively, and inquiring and examining into any defects which may appear to exist in the system of procedure of the administration of the law in the said High Court of Justice or the said Court of Appeal or in any other court . . . and they shall report annually to one of His Majesty's principal Secretaries of State.

"It appears that successive Lord Chancellors, commencing with Lord Selbourne and continuing to the present day, have only taken the initiative imposed on them by this section of fixing a day for such a meeting on three occasions in thirty-seven years. Lord Loreburn told us that in seven years he had summoned one meeting, but considered them useless. The Lord Chancellor said 'he could conceive no more futile proceeding. We should meet and it would come to nothing.' We feel that the view held by the Lord Chancellor and so many of his predecessors as to the inutility of such meetings is probably well founded; but assuming that to be so, we cannot but regret that they have not asked Parliament to relieve them from the duty imposed upon them by statute and to substitute some other methods of considering from time to time and securing any necessary reform in the administration of justice."

In view of the inability of both the legislature and the courts to serve as satisfactory agencies for the regulation of legal procedure, the judicial council was brought forward as an auxiliary agency which might formulate suitable rules of procedure and present them to the legislature or to the court for approval and adoption.

In order to serve this purpose successfully, the judicial council would, of course, have to have all the qualifications essential for the regulation of legal procedure. What are they? I should list them as follows: (1) Adequate technical information must be available. (2) There must be an inherent incentive to act. (3) There must be no domination by special groups which will interfere with an impartial administration of justice for the benefit of all interests concerned. (4) There must be the ability and opportunity to organize and direct research. Can the judicial council meet all of these tests?

First Requisite: Adequate Technical Information. This requirement would offer no difficulty whatever. The personnel of such a commission or council could be so selected as to draw upon the technical resources of all the important courts as well as the practicing bar. If so selected, it would be better equipped with technical information than the legislature, because the legislature is made up very largely of laymen; and it would be better equipped than any court, because the court not only includes no members of the bar but consists entirely of either appellate court judges alone or of trial court judges alone. This results in a restricted view—the view of the bench as distinguished from that of the entire profession, and of a single court as distinguished from that of the entire judiciary.

Second Requisite: Inherent Incentive to Act. Here again, there would seem to be no difficulty. As a rule-making body, such a committee or council would operate with no inhibitions against change. Its entire function would be to modify and improve the practice of the courts. It would have a task similar to that of the legislature itself, but in a more limited field. Its energies would not be scattered, but would be directed to a single purpose—the improvement of the administration of justice. No other interests would divert its attention, and no other duties would interfere with the effectiveness of its work. As a public body charged with responsibility for designing machinery for the efficient operation of the courts, the sole justification for its existence would be the success which it might attain in improving court procedure. Constantly subject to public criticism, it could hardly fail to make every effort to fulfill the single purpose for which it was created.

Third Requisite: Ability to Represent Impartially All Interests Concerned. The several interests involved are the trial court, the reviewing court, the bar, the litigants, and the taxpaying public. Each one of these components in the problem of judicial administration has special needs and naturally seeks special advantages, which are often inconsistent with the needs and advantages of others. Long court sessions are burdensome to the judges, but they are probably of advantage to lawyers, litigants, and public. Technicalities of procedure may seem to serve the purposes of lawyers, but they make the courts less serviceable to litigants. Juries relieve trial courts of responsibility for the decision of facts, but they cost the public a good deal of money.

The trial judge in England is required to take notes of the trial, showing the entire substance of the testimony, and an appeal can be taken upon the judge's notes alone. This makes a small record of five or six pages, in cases where we would have a record of one or two hundred. It places a burden upon trial judges, but it is of great benefit both to litigants, by saving an enormous amount of expense, and to appellate judges, by reducing the size of the records they must read.

There are similar conflicts of interest in connection with the printing of records on appeal. Appellate judges would rather read print than type-writing. Parties would rather pay for a typed record because it is cheaper. In England, they never print their records on appeal; they all go up in typewritten form. Printing is required only for the House of Lords. Printed records are against the interests of litigants and in the interest of appellate courts. It is said that printing bills for records and briefs in New York State run to a million and a half dollars a year.

All rules for simplifying appeals are advantageous to litigants and lawyers, but are against the interest both of trial judges, because they lead to more reversals, and of appellate judges, because they bring up more cases.

The auxiliary commission now being considered could, by a proper selection of its personnel be so constituted as specifically to represent the interests of all the trial courts, the appellate courts, and the bar, and in a more general way to represent the litigants and the public. It would contain its quota of lawyers; and lawyers are in touch with clients, while judges are not. Being in touch with their clients, lawyers are in a far better position than the judges to understand the public attitude toward the administration of justice. The rule-making agency might very well have lay members. English commissions for investigating the courts and suggesting improvements often consist largely of laymen. The lay members will probably be fully as valuable as the professional members of the council.

Fourth Requisite: Ability and Opportunity to Organize and Direct Research. Problems found in the field of judicial procedure are exceedingly difficult. They call for both statistical and observational studies of litigation in all its phases, and an extensive comparative review of the experience of other jurisdictions. Without an adequate organization for such research, under a highly expert direction and control, proposals for improvements in procedure would lack substantial foundation. Obviously, courts have no time, energy, or inclination for procedural research. But an auxiliary commission, working in coöperation with them, would be an ideal agency for such a task. Its personnel would be chosen on the basis of interest in such work, and the continuity of its existence and its activity would make possible the collection of adequate statistics and the carrying out of extensive observations.

A more or less complete recognition of the necessity for providing these requisites is apparent in all of the statutes by which the various judicial councils were created. Most of them were modelled on the general plan of the Massachusetts Act, adopted in 1924.

The jurisdiction of the judicial council is ordinarily limited to the field of judicial procedure, and does not include the substantive law. The council is usually required to make a continuous study of the organization, rules, and methods of procedure and practice of the judicial system of the state, the work accomplished, and the results produced by that system and its various parts. It is under a duty to file an annual report in which it makes such recommendations as it believes desirable both for legislation and for such rules as the courts are competent to make.

To facilitate its studies and to enable it to build up a continuing series of statistical records, it is common to require the clerks and other officers of the courts to make to the council from time to time such reports as the council shall prescribe. Under such authority, given in express terms or implied from other language in the statute, twelve state judicial councils are collecting and publishing very illuminating statistics regarding the work of their courts. They show, among other things, the distribution of the load of judicial business among the different districts and upon the various judges, thereby facilitating equalization by temporary shifting of judges and by permanent rearrangement of districts. They show the comparative volume of different types of cases, thereby indicating the relative aggregate importance of reforms specially applicable to certain kinds of litigation. They show the speed with which cases are disposed of, the effect of various procedural devices in facilitating judicial processes and eliminating delays, the comparative results obtained in cases tried with and without juries, the volume of appeals from various courts and in various types of cases, and many other items of great importance in appraising the efficiency of the judicial system.

As a means for giving the judicial council additional facilities for research, a number of statutes include in the council a member of the state law school, who is in a position to take an active part in the research program of the council.

The personnel of the council is designed to represent various groups concerned with the administration of justice. Thus it is very common for the judicial council to include judges of different courts, both trial and appellate, and several practicing lawyers; and many councils add the attorney-general, representative members of the legislature, and laymen, as well as a member of a law school faculty. But the size of the council is usually limited to less than a dozen, so that it can function effectively.

The financial support for judicial councils given by the state has usually been quite inadequate. Eight of the councils receive no appropriation whatever. Five receive $1,000 or less. Most of the others receive from $1,500 to $2,500. New York appropriated $15,000 last year, and $30,000 for the current year, which, with reappropriations of unexpended balances, gave its judicial council the best financial support of any in the United States. After its organization in 1934, the New York judicial council received $50,000 a year for two years, and thereafter $40,000 a year for three years. But it was found that it could not profitably use so much, and the reduction was made with the approval of the council itself.

The character and extent of the work done by the various judicial councils differ greatly. In addition to collecting judicial statistics, some, like those of Massachusetts and New York, have pursued the policy of preparing specific legislation embodying the reforms which they wish to accomplish, and recommending its passage by the legislature. Others, like that of Michigan, have confined their activities to making very extensive research studies in various important fields of judicial administration. These have been published and widely circulated, not only locally but throughout the country, so that interested persons in other states may have the benefit of the information which they contain. For example, the first annual report of the judicial council of Michigan, containing the first complete study of American procedure for condemnation of land, has been in constant demand by United States district attorneys all over the United States in connection with government projects involving condemnation.

The aggregate contribution of American judicial councils to the study of judicial procedure has been large. Almost every phase of administration has been dealt with, including bar organization and admission to the bar, appellate procedure, arbitration, attachment and garnishment, courts and court organization, criminal investigation and criminal procedure, discovery, divorce, evidence, judges, justices of the peace, motor vehicle cases, pleading and practice, probate procedure, receivers, venue, verdicts, and witnesses. The 1940 handbook of the National Conference of Judicial Councils gives an amazingly extensive bibliography of material bearing on the administration of justice found in the reports of judicial councils.

The organization just referred to, the National Conference of Judicial Councils, was proposed at the meeting of the American Bar Association at Memphis in 1929 by members of various state judicial councils, and it was formally inaugurated the next year at Chicago. Its purpose was to serve as a forum of discussion and a clearing house of information for the rapidly multiplying state councils. It has been actively associated with the Judicial Section of the American Bar Association, holding joint annual meetings with that organization.

At the present time, the National Conference, with the aid of funds granted by the Carnegie Corporation of New York, is engaged in publishing a series of books on the administration of justice. The first, *Criminal Appeals in America*, by Professor Lester Orfield, of the Law School of the University of Nebraska, and the second, *Organization of Courts*, by Dean Roscoe Pound, of the Harvard Law School, have already appeared. The third, *Appellate Procedure in Civil Cases*, by Dean Pound, is now in preparation. Others will follow.

The actual results accomplished by the judicial councils in improving the administration of justice are difficult to estimate. The publicity given to the work of the courts through the continuous publication of judicial statistics has undoubtedly given court officers a keener interest in the efficient performance of their duties. Facts disclosed by these statistics have made it possible to identify many weaknesses in the operation of the system and to provide corrective remedies. The amount of actual legislation directly obtained through the efforts of judicial councils varies widely in the different states. In Massachusetts, where the council has had the longest active experience in proposing specific bills for legislative adoption, there have been very substantial results. The 15th *Report*, issued in 1939, noted the passage, since the last report, of six bills recommended by the council; the 1938 report noted the passage of five such bills; the report of 1937 noted nine such bills. The 1939 report of the New York judicial council called attention to fifteen measures presented to the legislature by the council during the preceding year, which had been embodied in thirty-eight acts, in addition to nine recommendations embodied in eight amendments to the Rules of Civil Practice.

The effectiveness of a judicial council cannot be measured, however, by the volume of such direct accomplishments. The more intangible results of the work of the council, in stimulating discussion and suggesting lines of thought for members of the bench, bar, legislative bodies, newspaper press, and general public are probably even more important.

EDSON R. SUNDERLAND.

University of Michigan.

The Judicial Council of the State of New York; Its Objectives, Methods, and Accomplishments. I. *The Judicial Council and Its Objectives.* My assignment is to implement Professor Sunderland's brilliant primer on judicial councils by a more specific presentation utilizing the experiences of the New York State Judicial Council. Of the three elements that enter into a consideration of the judicial branch of government, the first—the substantive law, the law of rights and duties—is not within the province of the judicial council either in New York or elsewhere. The second element—the machinery of justice—is the principal field of the judicial council. If the council does its work well in that field, attention cannot fail to be focused upon the third and most important element—also part of a judicial council's problems—the judicial personnel.

As Professor Sunderland has stated, the improvement of the machinery of justice is the most neglected of these three elements. Permit me to point out that a new technique is required in dealing with this phase of the problem. Problems of substantive law have been intensively developed in the law schools and in legal literature in this country during the past half-century. Not so with adjective law. The development of a method of approach and solution to its problems remains a pioneer work.

The Judicial Council of the State of New York was created by statute in 1934 as a permanent research body to advise the legislature and the courts on improvements in the administration of judicial justice. It deals with the organization, jurisdiction, practice, procedure, evidence, and administration of the courts. It is a clearing house for complaints and suggestions. The only direct power that the Judicial Council has is that, to assist it in obtaining facts and to carry out a constitutional mandate, it may establish systems of judicial statistics and record-keeping for the courts, and may also exercise the power of subpoena.

The fifteen members of the Council represent the bench, bar, legislature, and public. Representing the bench are five judges. The Chief Judge of the Court of Appeals, our highest state court, is chairman. The presiding justices of the Appellate Division of the Supreme Court for each of the four judicial departments into which our state is divided are members *ex officio*. The chairman and the ranking minority member of the senate and assembly judiciary committees represent the legislature. The other members are appointed by the governor: one lawyer from each of the four judicial departments representing the bar, and two lay members representing the public generally.

Since its creation, the Judicial Council has devoted itself to removing the four classic defects in the administration of civil justice—unnecessary delay, complexity, uncertainty, and expense. From the outset, we decided that delay due solely to court calendar congestion was unreasonable if it extended more than two months in a commercial case or more than six months in a tort case. Of course, the problem of delay could have been solved by increasing the number of judges or otherwise increasing the expense of administering the judicial system. The problem, however, was to reduce and eliminate delay without any increase in cost. Because this problem had never been solved in New York State, many people were under the impression that it could not be solved.

II. *Some General Observations on the Advantages and Limitations of a Judicial Council.* In addition to the requisites of a successful judicial council which Professor Sunderland has so succinctly stated—that is, a will to do on the part of its members, a group and geographical representation to insure impartiality, and adequate financial support—permit me to mention three other factors. The first is the element of continuity—perpetual vigilance to replace the old methods of sporadic bolstering of the judicial system after chronic collapses. The second, perhaps equally if not more important, is that all recommendations be based upon an accurate, current factual and statistical foundation. Recommendations are no longer made on the basis of hypotheses, no matter how plausible. The third is that in New York the Council's functions are purely advisory. For this reason, it is generally recognized that the Council's recommendations are unbiased and solely in the public interest.

Given the foregoing requisites, the Judicial Council has accomplished much. But, as we have discovered, an inherent limitation springs from one of these sources of strength. I refer to the fact that the New York Judicial Council, as a purely advisory body, can properly only publish its report and recommendations, and prepare its bills, thereafter confining its contact with the legislature to the Council's four legislative members. It cannot with propriety do more to further its recommendations if the legislature should fail to act.

Occasionally our recommendations do need champions, particularly when a frontal attack is made. For example, recommendations that the legislature consolidate courts or decrease the number of judicial officers, that court fees be reduced, or that registered mail be utilized to effect service of process—proposals such as these cannot hope for immediate success, because all those persons who are adversely affected, either economically or otherwise, bestir themselves to oppose the measure. The one group that could most properly and effectively champion such recommendations is the organized bar. I think it can be said without hesitation that the organized bar in New York is one hundred per cent in favor of the Council's work. Nevertheless, in that organized bar only a small percentage of lawyers is interested, and an even smaller percentage is active. In fact, the bar relies on the Council.

III. *The Organization and Methods of the Judicial Council.* Just as history proves the need for the legislature and the courts alike to lean upon disinterested expert advice, so the Judicial Council itself relies in the first instance upon expert research and draftsmanship. Staff organization is therefore vital. In New York, the director who heads the staff is called the executive secretary. A judicial council director must have the attributes of both a professor and a practitioner. In addition, he must be a draftsman, and to obtain coöperative consideration all along the line he is required to be a diplomat. In short, he is something new, and I have ventured to coin a word to describe him—"judician." In New York, of three research assistants, one is principally in charge of judicial statistics, a second deals almost exclusively with library work, a third is in charge of the office administration and field work. Three stenographer-clerks complete the personnel. The staff devotes full time to its work. Part-time application, which has been responsible for the preparation of our adjective law in the past, has not been the least of the reasons for its constant breakdown.

Suggestions and criticisms come to us from all sources. We first make certain that a claimed defect actually exists, by checking the law, the facts, and the statistics. A staff member then prepares a study of the subject for which he is principally responsible, although all other members of the staff contribute their suggestions. Such a study is intended to be an exhaustive and complete reference work, to be published in the annual reports for the benefit of the bench and bar; and it usually follows a regular pattern. The New York law is traced historically, the methods of dealing with the subject in sister states are compared, and the subject is analyzed functionally. In the course of such triple analyses, the solution of the problem very often emerges. If not, further deliberation and consultation ensue. In any event, it is an iron-clad rule that the solution for a defect shall not be worse than the evil sought to be corrected. We then prepare a draft statute or rule embodying the solution. This we try to make clear, unambiguous, concise, and yet as complete and farsighted as vision permits. The statute or rule thus prepared, with the supporting study, is distributed to the members of the Council at its monthly meetings and passed upon.

After consultation with the chairman, many suggestions are rejected upon receipt. Some are rejected after preliminary research as unworthy of being brought to the attention of the Council. The Council rejects some proposals submitted to it after research, and more frequently modifies them. Likewise the legislature either rejects or modifies some Council proposals, and finally the governor occasionally vetoes a legislative enactment. Under this winnowing process, it is difficult for any unmeritorious matter to be enacted into law.

Our annual program is usually planned to include one or two recommendations of basic importance, for example, a uniform city court act. Second, we include several recommendations which are also of importance but not quite so far-reaching, for example, a revision of bills of particulars practice. Third, we present a half-dozen non-controversial improvements which by comparison are significant chiefly to the legal profession. Fourth, we recommend a few corrective formal changes. The third and fourth categories are usually accepted without question. The second group is likely to be accepted after some scrutiny. The first category, although small, has not fared too well, principally because one proposal may contain a good many controversial suggestions and all persons objecting to any one particular matter join the opposition.

IV. *Some Council Recommendations.* In the six years since the organization of the Council, 155 of its recommendations have been adopted either as statutes or as court rules, while 15 have not yet been adopted. These recommendations, some of which comprise literally hundreds of changes, cannot properly be considered singly, but should be considered together, like wire strands which go to make up a cable. In this field, the whole is greater than the sum of all its parts. Let me attempt to illustrate exactly what we have done by brief mention of a few of the more important recommendations.

1. *Civil Judicial Statistics.* As I have stated, the only direct power of the Judicial Council is to establish a system of judicial statistics. Conse-

quently, its first and possibly its most fundamental accomplishment was the establishment of a system for collecting civil judicial statistics, effective January 1, 1935. Such figures, although not ordinarily associated with problems of court procedure and administration, are to my mind essential in dealing with these problems. We have endeavored to establish a system at once simple, inexpensive, accurate, uniform, and above all, useful.

Briefly, we require the clerks of all civil courts, with the exception of some rural districts, to report the following information to us monthly on forms which we provide: first, a recapitulation showing the amount of work entering the court, the amount disposed of, and the amount left pending; and second, a notation of the exact point at which cases were disposed of in the courtroom each day, for example, whether disposed of on calendar call, during the trial, or by trial. So far as the manner of disposition is concerned, statisticians would refer to these as "mortality" reports.

I recognize as much as anybody that this is relatively an unplowed sociological field. Cynics occasionally ask, *cui bono?* When Farraday discovered the principle of the electric generator, he was asked of what use his experiments would be. He answered, as Benjamin Franklin had before him, "What is the use of a new born child?" So generally of judicial statistics. But in New York certain very great advantages have already become apparent.

In the first place, the figures show what work can be done, what is being done, and what remains to be done. They have proved the stimulus to the judges that Chief Justice Taft prophesied. They stimulate quality and quantity of work. They make possible better administrative control of the courts by arranging for assignments of judges from one part of the state to another.

In the second place, the information is of use in considering practice and procedural changes both before and after their adoption. The figures have shown that the five-sixths verdict in civil jury cases resulted in approximately 300 less jury disagreements, with requisite retrials each year—a noteworthy contribution to the reduction of delay and expense.

2. *Organization of Courts.* In 1935, the official referee system was revised and the jurisdiction of the official referees extended. By this means, more work of a detailed and lengthy nature could be and in fact has been given to the judges, who by constitutional mandate are forced to retire upon reaching the seventy-year age limit.

The four presiding justices of the Appellate Division of the Supreme Court are by law permitted to transfer supreme court justices from the judicial districts for which they have been elected, and in which there may be little work, to another district which may be somewhat congested. Since the presiding justices meet monthly as members of the Judicial

Council, there have been much more frequent assignments of the supreme court justices than heretofore.

Last year, we recommended a revised judiciary article of the constitution. The bill failed to pass the senate by one vote, but perhaps it will be more favorably received when the recommendation is renewed. The article contains proposals, among other things, for consolidation of certain courts tending toward their unification; proposals to permit the temporary emergency assignments of judges of courts other than the supreme court to courts other than those for which they were elected; and proposals for the removal of judges by our highest court, in addition to the present methods of impeachment and removal by the senate.

3. *Organization of the Jury System.* As to the jury system, at first the Council recommended particular improvements, such as women jurors and reducing the grounds for exemption from jury service, which were adopted and appear to be working very successfully. But last year, the Council recommended an entirely revised jury system for the City of New York which became effective September 1, 1940. That revision included provisions for insuring more care in examining and qualifying jurors, providing for as infrequent service for as short periods as possible in order to encourage citizens to serve, and providing for an extension of jury pooling with its consequent saving in cost. It is already clear that this revision has resulted in an improved jury personnel and a much more efficient administration of the jury system.

4. *Pleading.* Tremendous progress has been made in avoiding multiplicity of actions by permitting any type of cause of action to be joined in the same complaint or any type of counter-claim to be interposed, if the court believes the joinder or interposition would not inconvenience a just handling in one action.

5. *Trial and Preparation Therefor.* One of the principal contributing factors in reducing delay consisted of changes in the calendar practice which made it mandatory that a case be placed promptly upon the calendar or be dismissed. Bills of particulars practice was revised to be uniform throughout the state. The revision provided that such particulars be given as automatically as possible and be standardized as to personal injuries actions. Although successful with this improvement, we have not yet prevailed with our recommendation for a revision of the examination before trial procedure or with that for a pre-trial calendar and hearing.

Limitations of space prevent any discussion of the changes in trial procedure. Perhaps the most important was the five-sixths jury verdict in civil cases, already mentioned.

6. *Judgment and Its Collection.* Facilitating the machinery by which money judgments may be collected from those able to pay has been one of the important matters to which the Council has devoted itself, because the

Council felt that once a judgment had been made a thing of value, and not only made such but recognized to be such, the entire judicial process would benefit. We have been singularly successful in this field, having improved proceedings supplementary to judgment and executions, while this year we are recommending rounding out the attachment practice.

7. *Appeals.* We have provided for reducing the size of records on appeal, with consequent saving in expense. Many changes have also been made which insure a litigant that his appeal will not be lost for purely technical practice grounds.

V. *Results.* What have been the results of our work? In 1934, there was great delay in all types of cases and in all parts of the state, particularly in tort jury cases, where delays of three years were common. Today, within our standards of no more than six months' delay for tort cases and no more than two months' for commercial cases, delay has been substantially eliminated and calendar conditions in our courts were never better. There is no delay in any commercial or equity case, nor does it take more than two or three months to dispose of an appeal. The calendars have been cleared in the Municipal Court of the City of New York, which has jurisdiction up to $1,000 and disposes of the largest volume of civil litigation of any court in the country. This is a very large accomplishment. Pending cases in the Municipal Court dropped from 73,837 in June, 1934, to 19,829 in June, 1940. Delay in 1934 in the City Court of the City of New York, which handles cases involving amounts from $1,000 to $3,000, ranged from three to five years. That has been substantially eliminated, and the situation gives every promise of clearing entirely within the present judicial year.

In the supreme court, which is our great court of original jurisdiction, we still have delay in seven of the sixty-two counties of the state, although in June, 1933, much greater delay existed in twenty-one counties. Four of the seven counties present very little of a problem because the number of cases on the calendars has been so materially reduced. Thus the Council is able to concentrate on delay in the remaining three counties, which handle the largest amount of litigation in the state.

Of course, it is not asserted that these results were obtained solely through the activities of the Judicial Council; they required coöperative effort from the judges and from the legislature. There was also the unquestioned effect of natural causes, for example, a constant decrease in automobile injuries occurring on the highways of New York since 1928. The reduced volume of incoming cases in those spots where delay still exists varies from 12 per cent to 25 per cent, depending on the court and location. But, by and large, the contribution of the Judicial Council to the result is definite, because a constant, concentrated effort, both legislative and judicial, has been made to this end.

In view of the fact that delay has been substantially eliminated, more direct attention is now being paid to the reduction of complexities and uncertainties in practice and procedure. With standardization and unification of procedure, the number of practice decisions in our courts is steadily decreasing. The Judicial Council, by its mere existence and constant watchfulness, without any express power, has clearly stemmed the vagaries of some judges. Special legislation by which changes in procedure were formerly enacted by the legislature for the benefit of some particular litigant no longer exists. Finally, the administration of justice in the New York courts is today properly subject to a steadily narrowing amount of legitimate adverse comment. There is no longer any literature of facile general criticism.

On the whole, as I inferred at the beginning, criticism of the courts, which has been widespread in the past, is today coming down solely to a question of personnel; because the prompt, efficient, and just disposal of disputes in the New York courts has become a reality—a reality in which the Judicial Council has played the part for which it was established.

LEONARD S. SAXE.

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FOREIGN GOVERNMENT AND POLITICS

The Committee of the Whole in the Reign of James I. The origin of the English committee of the whole has evoked much conjecture from historian and political scientist alike, but no conscientious scholar has as yet found the subject worthy of exhaustive study. A scrutiny of the parliamentary sources for the period by the present writer shows, however, what the difficulties are. The meagreness of the records, especially for the sessions of 1604 and 1610, render a thorough examination of the problem almost impossible. In Professor Notestein's *The Winning of the Initiative by the House of Commons*,[1] we find the best treatment of the committee of the whole house. But the discussion is short and fails to satisfy the more curious student of parliamentary procedure. Professor Notestein tells us that, about 1607, "there appeared, rather accidentally, the Committee of the Whole House, a Committee at its beginnings so little different from the 'General Committee' of late Elizabethan days that its appearance excited little comment. . . . By 1610 it was becoming customary to refer many matters to it; by 1614 the House went into such a Committee on the least occasion; by 1621 there were four several Committees of the Whole House, which met on different afternoons, and the House went often into Committee in the afternoon about any matter in hand."[2] All this is undoubtedly true, but that authority is unable to assign any definite reason for the development of this practice and spends most of his time discussing the effects, which are undoubtedly more important to the historian. The problem of origins remains, however, unanswered.

In commenting on the origins, Professor Notestein points out the similarity between the "general committee" of late Elizabethan days and the early committee of the whole house. The present writer is unable to distinguish any important difference between the two and believes that they are one and the same. Both committees included all the members of the House of Commons; discussion was less restricted by the hardening rules of procedure; and in both the Speaker was absent from the chair. These, even in more recent times, have been the important features of the English committee of the whole.[3] The "general committee" of the late Elizabethan parliaments seems only another name for the newly-emerging committee of the whole. The records of these parliaments mention no fewer than five times the use of the general committee; and from these accounts there seems little doubt that we are witnessing the introduction of a new device in parliamentary procedure which resembles, in all essentials, the committee of the whole. And the contemporary Heywood Townshend, a member of the House of Commons, actually states that there were afternoon sessions of the House as a committee.[4]

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[1] Wallace Notestein, *The Winning of the Initiative by the House of Commons* (The British Academy. Raleigh Lecture on History. London, 1924).

[2] *Ibid.*, p. 37.

[3] Josef Redlich, *The Procedure of the House of Commons* (London, 1908), II, pp. 199–200.

The first definite record of the general committee that we have is found in a sitting of the House of Commons on March 7, 1592/3. And it is evident that this committee cannot have been used much earlier, for Sir Thomas Smith, writing in the sixties but later revising his work, failed to mention the device.[5] Besides, the entry for March 7, 1592/3, gives evidence of a certain unfamiliarity of the House with this committee procedure. In a debate over a subsidy to Queen Elizabeth, we are told: "Now stood up two or three to have spoken, striving who might speak first. Then the Speaker propounds it as an Order in the House in such a Case, for him to ask the parties that would speak, On which side they would speak, whether with him that spake next before, or against him; and the party that speaketh against the last speaker is to be heard first. And so it was ruled. Where it may seem, that the Speaker did give admonishment sitting in the House as a Member thereof, and not sitting in his Chair as Speaker, which he never doth at any Committee although it be of the whole House."[6] Such indecision on the part of the presiding officer is strong evidence of the novelty of this method of procedure. And that the committee was a committee of the whole is apparent from D'Ewes's remarks. It is also interesting to note that the Vice-Chamberlain made the report the next day from the general committee of the preceding afternoon, and that the decisions arrived at in committee were adopted without questioning by the House.[7]

Although we find several references to other meetings of the general committee,[8] the information is sketchy and leaves much to be desired. There is little reason, however, to doubt that the House of Commons was finding the less formal manner of procedure in committee of the whole of value for the fuller discussion of important matters.[9] It is also interesting to note that a royal official was charged with making the report from the committee, and that the Speaker's advice was so readily accepted. It is clear that the Elizabethan general committee was not devised to weaken the influence of the Crown in Parliament, but rather to facilitate discussion of important matters. And if we regard the Elizabethan general committee as an early committee of the whole (and there seems no evidence to challenge this view), we must reject the common assertion that, in the reign of James I, the "committee of the whole was first used by the House of Commons, primarily to protect itself against the king."[10] Such may have been the reason for later use of the committee, but it seems reasonable to conclude that the committee of the whole evolved in the late Elizabethan parliaments because it provided greater opportunities for debate than the ordinary sitting of the House, in which it had long been recognized that a member could speak only once to a matter on the same day.[11]

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[4] Heywood Townshend, *Historical Collections* (London, 1680), pp. 197–200, 238, 243, 288.

[5] Sir Thomas Smith, *De Republica Anglorum* (edited by L. Alston, Cambridge, 1906).

[6] Sir Simond D'Ewes, *The Journals of All the Parliaments during the Reign of Queen Elizabeth* (revised by Paul Bowes, London, 1682), p. 493.

[7] *Ibid.*, p. 495.

[8] D'Ewes, *Journals*, pp. 629–31; Townshend, *Historical Collections*, pp. 197–200, 238, 243, 288.

[9] Of the five meetings of the general committee, two were held for the discussion of subsidies to the Queen, two were for the discussion of monopolies, and one involved consideration of the Dunkirk Affair.

But this view is not entirely erroneous. The increasing use of the committee of the whole house in the parliaments of James I coincides with the growing intensity of the struggle between Crown and Commons. The more frequent use of this committee was undoubtedly due, in part, to a recognition of its efficacy as a device to hinder the Speaker and the Privy Councillors from exerting an undue influence over the actions of the members of the Commons. Professor Notestein declares it impossible to say that this was a practice developed to get rid of the Speaker. But he notes that "during the first years of James' reign, the King was doing frequently what Elizabeth had done only now and then, summoning the Speaker into his presence as if he thought the Speaker instead of Councillors was the natural channel of communication between Sovereign and Commons. Whether or not there was any connection between the development of this new procedure and the close relations between King and Speaker, it is certain that the Commons found it a convenience of the committee plan that the Speaker could no longer regulate their debates. The Committee of the Whole House usually chose men who were not privy councillors as chairmen; in the twenties, almost without exception, they chose men from among the new leaders of the House."[12]

In the first session of Parliament in the new reign, there is mention neither of the general committee nor of the committee of the whole. But such omission is not definite proof that the device was not being used. The *Commons Journal* would necessarily omit any description of the proceedings of the House in its unofficial meetings. In any event, we fail to find a reference to the committee of the whole until 1606.[13] The rising opposition between the King and Commons was reflected in the attitude of the lower house toward the Speaker. On March 11, 1605/6, in the matter of purveyance, the House found that the large committee was a useful device for freer discussion. After a long debate, "the Howse ordered that the former committees[14] appointed to consider of grievances should consider farder thereof, and likewise what is fit to be doon for supplie of the Kings occasions, and at this Committee anie of the Howse to be present and every man present to have voice as a Committee, the time to be to morrow being wensday, 12 *Martii* in the afternoone, the place, the parliament chamber."[15] Mr. Campion, in his account of the procedure of the House of Commons, is undoubtedly right in his shrewd guess that the transition to committees of the whole house was partly due to the practice of allowing the larger select committees to be attended by other members of the House, who had not been nominated members of the committee.[16] But his reason for this permission, the relatively high quorum of a committee, is far less convincing.

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[10] Lindsay Rogers, "Legislative Committees," in the *Encyclopedia of the Social Sciences* (New York, 1931), IV, p. 40.

[11] Smith, *De Republica Anglorum*, p. 54. "He that once hath spoken in a bill though he be confuted straight, that day may not replie, no though he would change his opinion. So that to one bill in one day one may not in that house speake twise. . . ."

[12] Notestein, *op. cit.*, p. 37.

The first definite mention that we have of the committee of the whole, in the reign of James I, is found in an entry for April 24, 1606. The hostility toward the Speaker is easily discernible. "The Committees for the Matter of Grievances or so many of them as were present, and such as offered and arose voluntarily to accompany them; went up into the Committee Chamber to Marshall these Grievances, during which tyme being a full hower the House did sitt idle without doeing anything; after which long pawsing, the Committees sent word that they would come downe into the House (if so it pleased the House) and conferr with the Company, not as in the House, but by way of Committee: This the Speaker having received from them by the Sergeant, did deliver to the House, and the House alloweing thereof; The Speaker added, that himselfe in this Case was to departe the place, which with allowance he did and the most of the Company departed with him. . . ."[17] The statement, "that himselfe in this Case was to departe the place," is of unusual interest. Was the Speaker merely weary of waiting for the committee to report? Or was this a recognition that he was excluded from the meetings of the committee of the whole? There is little other evidence available to inform us of the Speaker's position at this time in the committee of the whole. But if he truly recognized that he was excluded from these meetings, then two important deductions can be made. First, that this meeting of the committee of the whole was not the first one held recently. How, if a well-defined practice had not been developed, did the Speaker recognize that "himselfe in this Case was to departe the place?" The second deduction we may make is that, by 1606, the Commons had become sufficiently hostile to the Speaker to wish him excluded from the committee of the whole. But the wording of this passage is vague, and such conclusions, although supported by other evidence,[18] are exceedingly dangerous. The practice, as we shall see, was far from uniform, and in many cases it is extremely difficult to determine whether the Speaker merely left the chair or left the House.

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[13] Professor Notestein found the first meeting of the committee of the whole in 1607. The appearance of Bowyer's *Diary* in 1931 has given us, however, new reliable information which Notestein did not have at the time he wrote.

[14] The term "committees" was generally used during this period to denote the individual members of a committee.

[15] David Harris Wilson, *The Parliamentary Diary of Robert Bowyer, 1606–1607* (Minneapolis, 1931), pp. 76–77.

[16] G. F. M. Campion, *An Introduction to the Procedure of the House of Commons* (London, 1929), p. 21.

[17] Bowyer, *Diary*, p. 136.

On November 27, we find a definite endorsement of the committee of the whole house by one of the leaders of the opposition. Concerning the proposed union with Scotland, "Sir Edwyn Sandys moved a Conference with the Lords, but not before we have here debated it by Points; But, quoth he, the 2d. Question being, Whether here to be debated by a Committee or in the House, I thinck by a Committee, because there a reply is admitted, which is not here."[19] This greater freedom of debate was undoubtedly of large importance in stimulating the use of the committee of the whole, but we wonder whether that was the most important reason for Sandys' proposal.

The difficulties over James' project of a union with Scotland led to increasing use of the committee of the whole. It is worthy of note that the Speaker was definitely excluded from some of the meetings. On May 7, 1607, for example, it was moved that the bill concerning hostile laws between the two countries should be committed, and it was "Affirmed, that if Mr. Speaker were absent, the whole House might be a Committee; and thought fit to commit this Bill to the whole House, Mr. Speaker only excepted."[20] It is of considerable interest, too, that the motion to go into committee followed a speech by Sir George Moore, another popular leader, concerning "Speeches carried, or miscarried to his Majesty."[21] The Speaker, recognizing a shaft aimed at him, felt impelled to make an indignant but scarcely convincing repudiation of the charges.[22]

During this session, the motion for going into a committee of the whole seems closely connected with the departure of the Speaker. On June 26, it was "Disputed, whether Mr. Speaker should depart, and the Committee sit,"[23] but the House, finding no precedent for a committee of the whole during the Speaker's usual attendance upon the House until eleven o'clock, decided to defer the committee until the afternoon.[24] The more complete account obtainable from Bowyer's *Diary* tells us that it was Sir William Strowd, another opponent of the proposed union with Scotland, who moved for the departure of the Speaker.[25]

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[18] *Commons Journal*, I, 371; I, 1042; I, 429.

[19] Bowyer, *Diary*, p. 197.

[20] *C. J.*, I, 371; I, 1042.

[21] *Ibid.*, I, 1042.

[22] *Ibid.*

[23] *C. J.*, I, 1054; cf. I, 387. "The Amendments and Provisions annexed to the Bill of hostile laws, sent down from the Lords, were secondly read, and committed to the Great Committee named upon the Second Reading of the Bill itself in this

Although the select committee continued to be, throughout the reign of James I, the customary mode of procedure in the House of Commons, on important matters on which there was much difference of opinion between the Crown and Commons it is increasingly evident that the committee of the whole was finding favor as a parliamentary device of the leaders of the opposition. On occasion, a Crown official presided, but usually there were good reasons why such selection was made. In the committee meeting on June 26, 1606, Mr. Fuller thought it wiser to refuse the chair in favor of Mr. Attorney, and, with that royal official in the chair, Mr. Fuller took a prominent part in the debate.[26] In this second session of Parliament, it is easily apparent that the new leaders of the House of Commons had recognized the possibilities of the rather new and hitherto infrequently used committee of the whole and were using it more and more frequently for the discussion of controversial issues.

By 1610, the use of the committee of the whole was becoming more common. The desire of the lower House to obtain redress for their numerous grievances stimulated the use of that mode of procedure. The committee of grievances, appointed on February 15, 1609/10, to consider Salisbury's request for supply,[27] was a select committee, but it included all the lawyers of the House, the first knight of every shire, and the first burgess of every borough. Any member who so wished had the right to attend. The similarity between the large select committee and the committee of the whole is striking and illustrates once more the complex factors that led to the initiation of the committee of the whole as the regular mode of procedure in the House of Commons. Following the king's assent to the Commons' request to treat the subject of feudal tenures and wardships, the House proceeded to grapple with that knotty problem. Mr. May proposed a committee of the whole to sit every other day to discuss the problem, but it was finally decided by the House that a committee of the whole, to deal with the matter, should start sitting the next morning from seven or eight until 9:30.[28] The regularity of the sittings that followed is made clear by the order of the House, two days later, on March

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House: And moved, that Mr. Speaker might depart, and the Committee being compounded of the Whole House, and now together, and the Business of the House very little, might (for saving of Time) presently into Consideration of their Charge . . ."

[24] *Ibid.*, I, 387–8.

[25] Bowyer, *Diary*, pp. 351–6.

[26] *Ibid.*, p. 356.

[27] *C. J.*, I, 393–94.

[28] *Ibid.*, I, 411. Motion of Sir Maurice Berkeley.

17, to the Clerk "to attend, and say Prayers in the Morning, at the great Committee for Wards."[29]

It is important to note that, contrary to the practice in the preceding session, the Speaker usually attended the meetings of the committee. On March 23, we are informed that "This Day the Committee for Tenures, *etc.*, sat till half an Hour after Eleven; the Speaker, from Nine sitting in the Clerk's Chair; the Clerk standing at his Back; and Mr. Recorder, the Moderator of the Committee, sitting on a Stool by him."[30] On March 26, Sir Henry Montague, the Recorder, reported from this committee discussing the Great Contract, and proposed that, in return for £100,000, the king should give up all the emoluments resulting from all feudal tenures with the exception of the aids.[31] The unwillingness of the king to accept these terms led to renewed sittings of the committee of the whole on tenures and wardships;[32] but, on May 4, the negotiations were, for a time, brought to a close.

The high interest in impositions which the committee on grievances, under the leadership of Edwin Sandys, was discussing ensured heavy attendance at the meetings of that large select committee. The records lead us to infer that it was fast becoming a committee of the whole; for we are informed that on May 19, "Mr. Speaker retired to the Committee Chamber. The Committee for Grievances appointed to sit presently; touching the Messages . . . Mr. Speaker came down again, and the Message reported to the House by Mr. *Martin.*"[33] Interest seems to have been so great that during this meeting of the committee of grievances there was no sitting of the House. Another break in the regular procedure followed when the question of entering the Speaker's purported message from the king[34] was discussed by the House in committee. After the committee decided against entering it, "Mr. Speaker ascendeth his Place again. Mr. *Martin* reported the Agreement of the Committee . . ."[35] James' refusal on May 21 to promise discontinuance of impositions was followed by an angry scene in the House of Commons. Sandys moved for a committee to consider how they might obtain satisfaction. The motion was carried without a division.[36] And in the afternoon, the committee met.[37] On May

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[29] *Ibid.*, I, 412. [30] *Ibid.*, I, 414.

[31] Samuel R. Gardiner, *Parliamentary Debates in 1610* (Camden Society Publications, Vol. 81, London, 1862), p. 146.

[32] *C. J.*, I, 420. On the motion of Mr. Martin, it was agreed that the committee meet as before at 7 A.M. until 9. [33] *Ibid.*, I, 429.

[34] On May 11, the Speaker informed the House that he had received a message from the king commanding them to refrain from discussing the royal right to levy impositions in general. Finally, upon question, the Speaker confessed that the message was not from the king but from the Council. See S. R. Gardiner, *History of England, 1603–1642* (London, 1883–84), II, p. 70. [35] *C. J.*, I, 430.

[36] *Ibid.*, I, 430–31. [37] *Parl. Debates*, 1610, pp. 36–41.

23, Sandys reported the petition of right which the committee had drawn up, in which the Commons asserted their right to debate any matter which concerned the rights and interests of the subject.[38] Again in June, after the king had granted them the right to discuss the whole matter,[39] the Commons proceeded, in committee, to consider the subject of impositions.[40] On June 23, the House resolved itself into a committee of the whole. "At Nine a Clock, Mr. Speaker removed from his Chair; and the Committee for the Dispute of new Impositions—and was disputed."[41] For four days the debate continued,[42] and, on July 3, Sandys finally reported its results.[43] A sub-committee was appointed by the committee of the whole to draw up a petition which was to be inserted in the general petition of grievances. The rest of the session saw numerous sittings of the committee of the whole. This device was fast becoming a common part of House procedure. The Great Committees, as they were often called, sat usually for discussion; the detailed work was assigned to small sub-committees.

For the second session of 1610, we have little available information about House procedure, but the Parliament of 1614 saw even more use of the committee of the whole than in 1610. On April 8, immediately after the opening of the session, it was ordered that the "general Committee of the whole House, for receiving Petitions, to meet every *Tuesday*, in this House, at Two in the Afternoon."[44] But following a motion of Mr. Hakewell, it was decided to tie the committee to no fixed time of meeting.[45] And on Monday, April 11, Sir Edwin Sandys moved, "for avoiding Precipitation, and Prevention, and Division, That in all such Motions as shall not come in by Bill, and shall concern the general [welfare], no Resolution may be [made] that Day; but it may be committed, and reported; the rather, because here One may speak but Once in One Day, where, at the Committee, Two or Three times; whereupon often the Committees, first disagreeing, afterwards agree."[46] Although decision on this motion was deferred, the value of the committee of the whole, it is clear, was being recognized—especially by the leaders of the opposition. Important matters were referred almost at once to a committee of the whole house. On April 11, the act concerning the Elector Palatine and the Princess Elizabeth was referred, after the second reading, to a committee of the whole.[47] It is worthy of note, however, that Mr. Attorney (Sir Francis Bacon) reported back the measure from committee.[48] On April 12, a bill for free trade was referred to the committee on petitions;[49] and, on April 15, the House, on Sandys' motion, agreed that the grievances which had been presented to the last Parliament should also be discussed by the committee on petitions.[50] During the next few days, various other important matters were referred to committees of the whole. On April 18, after the second reading, the bill "concerning Taxes and Impositions upon Merchants" was committed to the whole House,[51] as were the matters of the Cambridgeshire election, recusants, and "undertakers" in the last election.[52]

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[38] *C. J.*, I, 431.

[39] On May 21, the king had angrily declared that he would not have his prerogative questioned, but on May 24 he found that he had gone too far. In reply to the deputation sent by the Commons with the petition of right, James gave them full liberty to consider the subject. Gardiner, *History of England*, II, 70–72.

[40] *C. J.*, I, 436–40.

[41] *Ibid.*, I, 443.

[42] *Parl. Debates*, 1610, pp. 63–110.

[43] *C. J.*, I, 445.

[44] *Ibid.*, I, 457.

[45] *Ibid.*

[46] *Ibid.*, I, 458.

[47] *Ibid.*, I, 459.

By the beginning of May, so much business had accumulated in the committee for petitions that Sandys moved, in behalf of that committee, that it now be allowed to sit on Tuesdays, Thursdays, and Saturdays. The House readily consented.[53] The committee engaged in another long discussion of impositions;[54] the Cockayne project, too, received consideration.[55] On May 27, the speech of Neile, bishop of Lincoln, was there discussed at a meeting called "to consider of an Answer to the King's Letter; and to take into their Consideration of all Misinformations made to his Majesty." Again the Speaker felt that he was the object of attack and endeavored to clear himself from the charges.[56] The continued attacks on Neile, despite his excuses, led the king, on June 3, to threaten the Commons that, unless they proceeded immediately to treat of supply, he would dissolve Parliament.[57] On the motion of Sir Herbert Crofts,[58] however, a committee of the whole was chosen to discuss the matter and to prepare an answer to the king's message. The dissolution of Parliament followed soon after, but the session of 1614 must be considered the first in which the committee of the whole was differentiated for the discussion of various matters and was given specific days and hours of meeting. This was especially true of the committee of the whole house on petitions, which was assigned at the beginning of the session every Tuesday afternoon for meetings.

In the parliament of 1621, however, the use of the committee of the whole became even more definitely established. So much business had been assigned to the overburdened committee of the whole for petitions that four such committees were now named, with specific subjects of discussion. The committee for petitions, which, in the session of 1614, had acted as a "steering committee," was now made a select committee, but its work was apportioned to four committees of the whole. At the suggestion of Sir Edward Coke, a committee of the whole for grievances and the king's supply was set up by the House.[59] At the first meeting, Coke was called to the chair, but immediately was challenged by Sir Carew Raleigh, who erroneously stated that "it was never seen that a Privy Councillor was called to the Chair." In reply, however, it was pointed out "that being all members of one House there was no difference and therefore the House might set up anyone whom they pleased . . ."[60] Besides, it was clear to all that Coke was no longer consulted by the king; he had broken with James in 1616, and, although recalled in the next year to the Council, he had from the first, in the Parliament of 1621, appeared as a popular leader and the most notable man in the House.[61]

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[48] *Ibid.*, I, 461.
[49] *Ibid.*, I, 464.
[50] *Ibid.*, I, 466.
[51] *Ibid.*, I, 466–67.
[52] *Ibid.*, I, 468, 470, 471.
[53] *Ibid.*, I, 475.
[54] *Ibid.*, I, 487, 490, 491.
[55] *Ibid.*, I, 492.
[56] *Ibid.*, I, 500.
[57] Gardiner, *Hist. of England*, II, 244–45.
[58] *C. J.*, I, 505.

Three other committees of the whole were named—for courts, trade, and religion. Although criticisms of this mode of procedure were still forthcoming,[62] an ardent defender was found in Sir George Moore, who justified the committee of the whole on grounds of earlier procedure. "Anciently committees were but a few and that of those only that speak to the bill, but if the bill concern general grievances then one knight of every shire and many times the whole House."[63] And the general opinion of the House was on his side; for in the long debate about the decay of the cloth trade, "Divers moved that since this was a matter of so great a consequence that it might be referred to a Committee of the whole House, which was agreed."[64]

The large number of references to the committee of the whole in the numerous diaries which have been collected to amplify the *Journal* for 1621, supplemented by the more definite references in the Book of Committees[65] for the same session,[66] assure us that by 1621 the committee of the whole had been incorporated as a regular part of the procedure of the Commons. Although matters of small importance were still referred to select committees, by this time the four different committees of the whole, meeting on different afternoons, give clear proof that much of the important business of the lower House was being transacted in that way. Besides, the House went often into committee about any specific matter in hand.

By 1624, the committee of the whole was fixed. Three committees of the whole house were named early in the session. On February 23, at the suggestion of Mr. Delbridge, the House agreed to set aside time every Friday and Monday afternoon, beginning at two, throughout the session for a committee on grievances.[67] It was also resolved, in accordance with Sir Robert Phelips' motion, that a committee of the whole house for courts of justice be authorized to sit every Wednesday.[68] Thursday afternoons were set aside for meetings of the committee of the whole on trade.[69] Later in the session, there were various meetings of the committee of the whole house to discuss foreign affairs, the continuance of statutes, subsidies, etc.; but the three committees named early in the session were the most important. Under the leadership of their respective chairmen, Sir Edward Coke, Sir Edwin Sandys, and Sir Robert Phelips—all leaders of the popular cause—the business of the House was transacted efficiently; reports were frequent, and the House seemed well content with the procedure which had rapidly developed since the late Elizabethan days.

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[59] The motion was made, however, by Mr. Alford. *Commons Debates, 1621*, edited by Wallace Notestein, Frances Helen Relf, and Hartley Simpson (New Haven, 1935), II, pp. 23–24. [60] *Ibid.*, II, p. 24. [61] *D. N. B.*

[62] *Commons Debates, 1621*, II, pp. 65–66. "Sir Thomas Roe said that the committees [of the whole] were too great, so that whereas there were several businesses referred to several committees and all handled at once, now one business takes up the whole House." [63] *Ibid.*, II, p. 66. [64] *Ibid.*, II, p. 78.

[65] The Book of Committees is probably an official journal of the committees of the whole for this session. A contemporary diarist speaks of "two books kept by the Clerk, the one of business of the House, the other of the Committees of the whole House." *Commons Debates, 1621*, I, 96–97. [66] *Ibid.*, IV.

By this time, nearly all important questions were referred to the committee of the whole house. The House was likely to lay down certain principles; the committee worked out the details or else authorized a subcommittee to prepare a definite plan. The requisite attendance at morning and afternoon sessions meant, of course, an increase in the business of all members. The privy councillors had less influence now than they had had in the select committee; legislation was being drafted by sub-committees, and a considerable new machinery was growing up in the House. The order of business was rearranged that more speed might be obtained. It was the pressure of public business that led to the new procedure in the House.[70] Parliament was no longer content with acting as a rubber stamp for decisions made in advance by the Crown. The new leadership was eager to initiate and formulate legislation. In order to do so, the Commons had to gain control of their own parliamentary processes.[71] One step in this direction, it seems clear beyond doubt, was the evolution of the committee of the whole house, which allowed greater freedom of discussion and released members of the House of Commons from the undue influence of Crown officials.

In summary, then, we may say that as the Commons began to take genuine initiative in legislation, the committee of the whole, with its subcommittees, furnished a far better center from which new bills could emanate than did the House itself. During the previous reign, the Privy Council had acted as a similar center for government initiative in legislation. Gradually, the Commons took more and more interest in new legislation. The appearance of the Elizabethan general committee shows the development of such interest. As that interest grew steadily greater in the reign of James I, and slowly turned into initiative on the part of the Commons in legislation, it was only natural that the center for this growing interest, the primitive general committee, should be turned into the all-powerful committee of the whole.

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[67] *C. J.*, I, 671–72. [68] *Ibid.*, I, 672. [69] *Ibid.*

[70] Notestein, *The Winning of the Initiative*, pp. 34–41. [71] *Ibid.*, p. 53.

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Some New Light on the Growth of Parliamentary Sovereignty: Wimbish versus Taillebois. It is almost as difficult to read the thoughts of the past from the scattered dicta of the sixteenth century law books as to reconstruct a dinosaur from the fragments of a skeleton; yet many of these early cases illuminate important changes in legal and political affairs. The case of Wimbish v. Taillebois[1] is one of particular interest because of Chief Justice Montague's opinion, which casts some light upon a little known phase of the constitutional development by which the property rights of the individual were brought under the control of the state. In the early Middle Ages, the power of the king over private rights was weak; the notion that the subject's rights were inviolate was strong. During the Middle Ages, royal authority and parliamentary authority grew extensively, and by the sixteenth century king in parliament was able to seize church lands and transfer property rights by statute. Montague justified such transfers of property from one individual to another by applying the mediaeval theory of taxation by consent to out-and-out transfers of property by Parliament. Such a doctrine increased the power of Parliament greatly by placing property rights directly under its legislative authority. It therefore marks an important step in the growth of the theory of parliamentary sovereignty.

In seeking a precedent for such a doctrine, it was natural that Montague should turn to the parallel of taxation. As early as the thirteenth century, English kings had been granted taxes by assemblies of magnates; later, they received them regularly from more fully representative parliaments. Such taxation was thought of by certain lawyers as a free gift of individuals. A judge in the fifteenth century spoke of a subsidy as a " 'grant made by the spontaneous will of the people.' "[2] Another lawyer in the same case treated Parliament, when it granted a subsidy, as a "guild or corporation totally devoid of governmental aspect."[3] Taxation was not an act of royal will; it was a free gift. The tax was justified by the theory that all men who were taxed gave their consent in a representative assembly. This doctrine was an outgrowth of a dominant mediaeval notion—one of the commonplaces of constitutional history—that a subject's *iura* could not be touched without his consent. The doctrine of consent to the taking of property was worked out more fully in connection with taxation than with legislation. Although legislation dealing with private rights in a general way was a familiar process in the fifteenth century, such legislation was usually supplementary to the common law, serving to protect private rights more fully. Upon occasions, the common law was changed and private rights were attacked, but property rights were not normally infringed in Parliament by general laws.[4] Moreover, English mediaeval jurisprudence was deeply imbued with the notion of fundamental law, of which the law of property was held to be one of the chief branches.[5]

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[1] Edmund Plowden, *The Commentaries or Reports of Edmund Plowden* (London' 1816), I, pp. 38–60.

[2] The case of the Rector of Edington, quoted by T. F. T. Plucknett, "The Lancastrian Constitution," in *Tudor Studies*, edited by R. W. Seton-Watson (London, 1924), p. 165. Newton C. J. disputed an argument of Fray C. J. that a subsidy was one of the revenues of the high court of parliament and made him agree that it was a grant by the people.

[3] Plucknett described Markham's discussion of Parliament in these words; *ibid.*, p. 179.

The reign of Henry VIII was one of startling innovations in the relation of government and property, as in so many other fields. The acts of the Reformation Parliament which transferred church lands to the king carried out a program which was in fact the spoliation of one estate of the realm by the king and a parliamentary majority. In other cases as well, the Reformation Parliament interfered with property, changed property law, and transferred lands by legislative fiat. All these acts violated the mediaeval principle of the sanctity of private right.

The ablest publicist in favor of expropriation of church lands, Christopher St. German, claimed for Parliament full arbitrary power to dispose of property. "It is holden," he wrote, "by them that be learned in the laws of this realm, that the parliament hath an absolute power, as to the possession of all temporal things within this realm, in whose hands soever they be, spiritual or temporal, to take them from one man and give them to another without cause or consideration. For if they do it, it bindeth in law and conscience."[6]

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[4] For a summary of the important statutes in this period, see W. S. Holdsworth, *A History of English Law* (London, 1923), II, pp. 447–484. See also S. B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge, 1935), pp. 192–214. Certain mediaeval continental lawyers had a clear conception of eminent domain and expropriation. Maitland quotes Decius as follows: "Decius, Cons. 250: a law may take away rights '*generaliter*' even '*sine compensatione privatorum*'; on the other hand, if this law does this '*particulariter alicui subdito,*' then it must be '*cum recompensatione.*' " See Otto von Gierke, *Political Theories of the Middle Age*, translated by F. W. Maitland (Cambridge, 1913), p. 179.

[5] See Sir John Fortescue, *De Laudibus Legum Angliae*, edited by Gregor and Amos (Cincinnati, 1874), pp. 239–240. See also Christopher St. German, *Doctor and Student* (Cincinnati, 1874), Chap. 2.

[6] Christopher St. German, *A Treatise concernyng the Division betwene the Spiritualtie and the Temporaltie*, Chap. ix, printed in *The Apology of Sir Thomas More, Knight*, edited by A. I. Taft (Early English Text Society, CLXXX, 1930), p. 228.

It is significant that St. German placed his arbitrary power in Parliament instead of in the king, as some Protestant theologians like Tyndale did, for St. German was a lawyer and one of the founders of the theory of parliamentary absolutism.[7] His statement, which is contained in a treatise against the temporal power of the clergy, illustrates how Protestants in the sixteenth century exalted the state in order to use it to attack Rome. St. German did not comment further on his remarkable proposition. In any case, his statement described the practice of the parliaments of Henry VIII.

It is not surprising that such a radical statement of Parliament's arbitrary power did not go unchallenged. Sir Thomas More wrote a long and withering attack on St. German's treatise, which he analyzed and refuted chapter by chapter. In the *Apology*, he forcefully denied the validity of confiscatory legislation. "By what right," he wrote, "may men take away from any man spiritual or temporal, against his will, the land that is already lawfully his own, that thing this pacifier[7a] telleth us not yet. Yet I have heard some good and wise and well learned men say, that all the world can never bring the reason that can prove it right. And as for my own part . . . if any man would give counsel to take any man's lands or goods from him, pretending that he hath too much or that he use it not well, or that it might be better used if some other had it, he giveth such counsel as he may well when he list and will peradventure often stretch forth a great deal further than the goods and possessions of spiritual men."[8]

Sir Thomas More was one of the outstanding advocates of the Catholic Church, but he was also Lord Chancellor, renowned for his legal wisdom. His flat denunciation of confiscatory legislation carries great weight as an expression of traditional legal thought. Because his book was addressed to the general public, not to a group of lawyers, he did not use a legal argument; but he asserted with great emphasis that St. German's proposal could never be proved right, and showed that such a radical legal theory would imperil all property. His warning was prophetic, for not only monastic lands which the anti-clerical party coveted, but the property of all men, came ultimately to be at the mercy of a parliamentary majority.

The legal principle of vested rights to which More appealed was no safeguard for the church against the determination of the king and his party to seize monastic property. For the time being, the arbitrary doctrine of St. German carried the day. The Act for the Dissolution of the

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[7] See F. L. Baumer, "Christopher St. German," *American Historical Review*, Vol. 42 (July, 1937), pp. 631 ff.

[7a] "Pacifier" is More's scoffing name for St. German, who published his tract anonymously.

[8] More's *Apology*, p. 86.

Lesser Monasteries,[9] which gave the property of the lesser monasteries to the crown, was the first exercise of the power St. German claimed for Parliament. This transfer of property, as far as appears, was accepted by the courts without discussion, although it was a clear invasion of the rights not only of the monasteries but also of some of the grantees of the monasteries who were deprived by an ex post facto law. In proceeding against the greater monasteries, confiscation by statute was not attempted because many of the abbots sat in the House of Lords.[10] In 1546, the program of robbing the church was completed; the chantries, colleges, and free chapels of England were dissolved by statute and their possessions were vested in the crown.[11] Henry VIII was able to put through arbitrary statutes against the church, but he met with stiff opposition when he attacked lay interests. Attempts to levy forced loans were resisted.[12] The Statute of Proclamations was amended in Parliament so as fully to protect private rights and the common law from infringement by proclamation.[13] The Statute of Uses was twice rejected before it passed in 1536.[14] Although Henry was often checked when he attacked common law rights, he did score a number of victories. Upon two occasions the king's debts were cancelled by statute.[15] Several important changes in the land law, the Statute of Uses,[16] and the Statute of Wills[17] were put through. Of these statutes, the most interesting to us is the Statute of Uses, because it occasioned Montague's dictum on transfers of property. The statute was passed to prevent evasions of feudal dues and legal responsibility which the older law of uses facilitated. Under the older practice, land in use belonged to the feoffee to uses who was seised of the land; the right to enjoy the land belonged to the cestui que use. The statute transferred the title of the land from the feoffee to uses to the cestui que use.

All these acts stand out in marked contrast to the attitude of certain mediaeval English lawyers. By a consistent and continued policy, the king had coöperated with a majority of Parliament to attack vested rights. Such parliamentary radicalism stood in need of a new theory of sovereignty by which to justify the control of property by Parliament. The opinion of Chief Justice Montague in Wimbish v. Taillebois provided a line of thought for such a doctrine and fitted in with English precedents.

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[9] *Statutes of the Realm*, edited by A. Luders, J. Raithby, *et al.*, (London, 1810–28), III, p. 575 ff.

[10] J. R. Tanner, *Tudor Constitutional Documents, 1485–1603* (Cambridge, 1922), p. 63.

[11] *Statutes of the Realm*, IV, pp. 24 ff.

[12] A. F. Pollard, *Henry VIII* (London, 1913), p. 165.

[13] E. R. Adair, "The Statute of Proclamations," *English Historical Review*, Vol., 22 (1917), pp. 34 ff. *Statutes of the Realm*, III, pp. 726 ff.

[14] Holdsworth, *op. cit.*, IV, pp. 450–458.

[15] *Statutes of the Realm*, III, pp. 315, 970.

[16] *Ibid.*, III, p. 539.

[17] *Ibid.*, III, p. 744.

The case of Wimbish v. Taillebois was argued before all the justices of the Common Bench in 1553. The case can be summarized briefly as follows.[18] George Wimbish and his wife Elizabeth sued Elizabeth Taillebois for trespass on land which Elizabeth Taillebois claimed as her property. The land in question was parcel of the manor of Golthough, which had been owned by George Taillebois, the husband of Elizabeth Taillebois and grandfather of Elizabeth Wimbish. George Taillebois granted this manor to a number of feoffees—among them Thomas Wolsey—to the use of himself and his wife in special tail. Some time thereafter he died. The serjeant for Wimbish argued that Elizabeth Wimbish, who was the next heir after the widow Taillebois, was the rightful owner of the land because the widow Taillebois defeated her title by being party to a fraudulent suit by which the land was transferred to a cousin with intent to defeat the title of the lawful heirs. By being party to such a recovery by cosin, the widow was deprived of her estate in accordance with a statute of Henry VII.[19]

Justices Molineux, Hales, and Brown gave opinions on the case in which they discussed the forms of the pleadings and the law of cosin, but they kept closely to the technical details of the case. Chief Justice Montague, on the contrary, went out of his way to deliver a dictum upon the nature of the transfer of property by the Statute of Uses. In order to show that the present case fell clearly within the meaning of the statute of 11 H. 7, the Chief Justice pointed out that the Statute of Uses transferred the ownership of land in use from the feoffee to uses to the cestui que use. Then he spoke of that transference of land in some detail. He pointed out that before the Statute of Uses, land in use was in the possession of the feoffee to uses.

"And when the statute of 27 H. 8 was made," he continued, "it gave the land to them that had the use. It is to be seen then, who shall be adjudged in law the donor after the execution of the possession to the use. And, Sir, the parliament (which is nothing but a court) may not be adjudged the donor, for what the parliament did was only a conveyance of the land from one to another, but a conveyance by parliament does not make the parliament donor; but it seems to me that the feoffee to uses shall be the donors, for when a gift is made by parliament every person in the realm is privy to it and assents to it, but the thing shall pass from him that has the most right and authority to give it. As if cestuy que use and his feoffees join in a feoffment it shall be said the feoffment of the feoffees, for they have the greatest authority to give it. And if a tenant for life and he in reversion join in a feoffment, it shall be judged the livery of the tenant for life, because he has the greatest authority to do it. And so if one who is seised in fee of land and another who has nothing in it join in a feoffment, it shall be said the feoffment of him that has the right and the confirmation of the other. So here it shall be said the gift of the feoffees by parliament and the assent and confirmation of all others. For if it should be adjudged the gift of any other, then parliament would do a wrong to the feoffees, in taking a thing from them and making another a donor to it. And, Sir, in the case of the Rector of Edington, 19 H. 6, where the king had granted to the Rector and his brethren that when a tithe was granted to him by the clergy they should be discharged and afterwards a tithe was granted by the clergy in their convocation, there it was held by the better opinion that the Rector should be discharged by the said grant of the king, notwithstanding that he was adjudged in law one of the convocation, and as such one of the grantors, for the common law saith that none shall be damnified by such special (*sic*)[20] grant by parliament. And therefore the writ of right patent in London was not taken away by the Statute of Westminster 2, cap. 1, De Donis Conditionalibus, but it remaineth to this day and the demandant shall make his protestation to sue in the nature of a formedon in descender as he shall in other real actions there. So that acts of parliament will not prejudice any. And here the land is by the act of parliament removed from the owners, that is to say the feoffees, to the cestuy que use, and the statute would do a wrong if it did not judge them to be the donors, for they have the greatest authority to give it, and the parliament is only a conveyance, and therefore it shall be adjudged the gift of the feoffees by parliament, and so the gift of the feoffees who are seised to the use of the husband, and then within the words of the second disjunctive sentence of the statute of 11 Hen. VII."[21]

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[18] Plowden, *op. cit.*, pp. 38–60.

[19] 11 H. 7, cap. 20.

All the judges held that the case was within the words of the statute of 11 H. 7, and they agreed that the heir might enter immediately in the life of the tenant in tail; but no judgment was given in our record of the case.

The opinion of Chief Justice Montague was not influential. It was referred to with approval by one of the judges in Coke's *Reports*,[22] but I have found no other reference to it. Nevertheless the opinion is of great interest because it illustrates a stage in the growth of parliamentary sovereignty. Its argument, which seems so unnatural to us, reveals the gulf which separates mediaeval political theory with its emphasis on justice and private rights from the modern political theory of an omnicompetent sovereign state. This opinion is one of the stepping stones across the gulf, but it lies on the earlier side, and Montague speaks the language of the mediaeval private law.

Montague viewed a transfer of property by general statute as a conveyance of land made by each individual owner and registered in the high court of parliament. No doubt he was comparing it to a conveyance registered in the Court of Common Pleas. He argued that Parliament as a corporate body—Parliament "which is nothing but a court"—had no authority to take property from one man and give it to another. On the contrary, he insisted that the transfers of property were authorized separately by the individual owners. He seems to have had no concept of the king-in-parliament acting as state sovereign, and thus he ignored the problem of a conflict between private right and public authority. It may be suggested that he avoided the problem of such a conflict because if the transfers had been viewed in such a light the weight of mediaeval precedent would have protected private rights against the interference of public authority. Thus Montague did not look upon the transfer as an act of government. Perhaps he sensed that the best way to get over an obstacle was to go around it. He made use of the mediaeval doctrine of Parliament's rôle in taxation and applied it to the present case.

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[20] The French text of Plowden's Commentaries (1648, p. 59), reads "per tiel general graunt per parliament." 'General grant' fits the sense of the passage.

[21] Plowden, *op. cit.*, edition of 1816, Vol. I, pp. 58–9.

[22] Sir Edward Coke, *Reports* (1777), Vol. I, p. 41b.

In the field of taxation, as we have seen, some mediaeval lawyers had evolved a theory of the nature of Parliament's power. Taxation was a free and spontaneous gift of the people to the king. It was not an act of government. In line with this theory, Montague showed how the power of Parliament, when it dealt with property, arose from its representative character, so that its acts were binding because they were the acts of all. Of course a tax on property is a much less drastic thing than the taking of the entire property. In one case, Parliament takes a small portion; in the other, it takes all. Stretching the doctrine of taxation to include the transfer of property was a tremendous expansion of Parliament's power, and seriously weakened the rights of the owner.

Although such was the outcome of his doctrine, the Chief Justice was very conscious of the sanctity of private rights. It is interesting that he referred to the case of a Rector of Edington, a fifteenth-century case in which the question arose whether a special grant by the king to the Rector exempting him from a tithe voted in convocation would excuse him from a later grant in convocation. One of the arguments of Markham, the serjeant for the Rector, is of especial interest. He said that Parliament was a corporation, and applied the private law of corporations to the case by affirming that the members of Parliament were not bound in their private capacity by the act of the corporation.[23] Thus he claimed that the special grant made by the king to the Rector was not defeated by the act of convocation. The decision is not given in our record of the case, but it is interesting to see that as late as the reign of Edward VI a judge believed that the view which held that an act of Parliament or an act of convocation could not invalidate a private agreement between the king and one of his subjects was the "better opinion." Nevertheless, Montague's treatment of Parliament was quite different from that of Markham. Although Montague agreed with Markham's conclusion that the Rector's exemption was valid, he rejected his argument that Parliament was a corporation in which the members were bound in accordance with the rules of corporation law. On the contrary, he treated Parliament as made up of individuals who were bound as individuals.

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[23] Plucknett, *op. cit.*, pp. 162–8. Two points of constitutional law are involved in this case: (1) Did an act of a representative body defeat the act of the king? (2) Did the Rector, being in law a member of convocation through his proxy, surrender his exemption when the later grant was made in convocation? The lawyers and the judges alike dealt with these questions as though they were questions of private law. The attorneys for the king, desiring to annul the exemption, argued that, having received an exemption from the king, the Rector as a member of convocation granted it back to the king, Furthermore, they said that the Rector was estopped

Montague's reference to this case shows how strong was the feeling that the private rights of the individual transcended the authority of any other agency. The acts of the Reformation Parliament, however, treated private property, in so far as it was monastic, in an arbitrary manner and controlled the property of laymen by statute; and we have seen that St. German stated catagorically that Parliament had an absolute power over property.

It was possible to reconcile by a legal fiction the action of Parliament with the older sentiment of the inviolability of private right. Montague said that the individual gave his own land himself, and that Parliament had no more part in the act than a witness to the transaction would have. The legal fictions that the decision of the majority was the decision of the whole body, and that every person in the realm was present in Parliament, had long been familiar to English lawyers. If these fictions were taken at face value, it was possible to argue that each individual concerned by the Statute of Uses gave his property freely by his own authority and to ignore the fact that some individuals were bitterly opposed to the transfer. Actually, Parliament, by its sovereign authority as representative of the people, was overriding private rights, but Montague did not see the action in this light. He said that the gift was not made by Parliament as a branch of the

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by the act of convocation from pleading the charter of exemption. Chief Justice Hody agreed with these arguments. Markham, serjeant for the Rector, reversed the estoppal argument by saying that the king was estopped from pleading the act of convocation. Furthermore, he compared Parliament to the commonalty of London. "Let us suppose," he said, "that a member of the commonalty of London is desseised of his free tenement by a stranger and that then the Mayor and the commonalty release the disseisor, then the release made by all the commonalty will not bar him from his particular inheritance, for as much as he does not claim it as one of the commonalty but as a private person . . . So here, although the Rector was party to the general grant of the fifteenth yet the special grant made to him alone is not defeated thereby unless there are words to that effect." Thus Markham seems to admit that Parliament could annul the Rector's exemption by special words. Plucknett, p. 166.

government, but by the owners who were parties to the statute. "For when a gift is made by Parliament," he said, "every person in the realm is privy to it and assents to it, but the thing shall pass from him that has the most authority and right to give it." By accepting without question the fiction that every subject assents to a statute, Montague overlooked the problem of representation. He made no mention of the relation of a member of Parliament to his constituent and ignored the whole question of the nature and extent of the powers delegated by a constituent to his representative; but his assertion that a subject was privy to Parliament's action implied that a member of Parliament had full power of attorney.

The closing words of this passage of the opinion are significant because they show how Montague's legal fiction enabled him to dismiss with a wave of the hand the question of a wrong done to the owners of private property. The transfer, he said, "shall be adjudged the gift of the feoffees by Parliament and the assent and confirmation of all others. For if it should be adjudged the gift of any other, then Parliament would do a wrong to the feoffees." Montague was making use of the old formulas to justify an act which in fact destroyed their meaning. The care with which he avoided disturbing traditional concepts suggests that his line of argument by which he extended the scope of the doctrine of consent was a novelty. Although he was speaking the language of More's "good and wise and well learned men," he advanced a legal theory which could be used to give Parliament, in St. German's words, "an aboslute power as to the possessions of all temporal things within this realm . . . to take them from one man and give them to another." The legal fiction that the act of the king and Parliament was the free act of every Englishman might deliver every subject's property into the hands of the king and a parliamentary majority. Thus the independence of the individual was curbed and his privileges were brought under the control of the will of the community. The doctrine of individual consent which had first been used to justify and legalize taxation was now called upon to legalize the regulation of private property.

Montague's argument had the merit of fitting in with the precedents of the common law and at the same time providing a means by which the common law tradition could be adapted to the needs of the modern state. There is no proof that he had any direct influence upon later writers about parliamentary sovereignty, but this case gives us a chance to see an unknown judge wrestling with the problems of modern sovereignty at an early date before lawyers were aided by Bodin's conceptual tools. Clumsy and sophistical his thought may seem to us, but it points the way that greater theorists were to travel in the future. Extension of the notion of consent from taxation to the regulation of property was a long step toward the omnicompetent Parliament that Blackstone glorified.

Edward T. Lampson.

Trinity College.

NEWS AND NOTES

PERSONAL AND MISCELLANEOUS

Compiled by the Managing Editor

At the 1940 meeting of the American Political Science Association, the Committee to Nominate Officers for 1942 was authorized (1) to follow the procedure of the committee for 1941 in canvassing the membership of the Association for suggestions for nominations, and (2) to publish its list of nominations in the October REVIEW. The committee (consisting of Robert R. Wilson, chairman, Charles G. Haines, Roscoe C. Martin, Roger H. Wells, and Harold Zink) reports the canvass duly made, and offers the following list of nominations: for president, William Anderson (University of Minnesota); for first, second, and third vice-president, respectively, Robert E. Cushman (Cornell University), Frederick A. Middlebush (University of Missouri), and James Hart (University of Virginia); for members of the Executive Council, Miss Keith Clark (Carleton College), Thomas I. Cook (University of Washington), Marshall E. Dimock (U. S. Department of Justice), James W. Fesler (University of North Carolina), and Max Lerner (Williams College). It may be added that, under a constitutional amendment adopted last year, the secretary-treasurer is now elected by the Executive Council rather than by the Association.

Dr. Herman Finer, of the London School of Economics and Political Science, is visiting professor of political science at the University of Michigan during the first semester of the current academic year.

Professor Peter H. Odegard, of Amherst College, has been elected to the board of directors of the Institute for Propaganda Analysis.

Dr. Wilbert L. Hindman, formerly of Colgate University, has been appointed assistant professor of political science at the University of Southern California, replacing Dr. Frank H. Jones.

Dr. Robert D. Leigh has resigned the presidency of Bennington College and has become a temporary member of the School of Economics and Politics of the Institute for Advanced Study at Princeton.

At the University of Michigan, Professor J. Ralston Hayden has been appointed to the James O. Murfin professorship of political science.

Professor David P. Barrows, of the University of California, has been appointed an adviser to Secretary of War Stimson. At the University, he is offering a new course entitled "Warfare and the Modern State."

After a year at Northwestern University, Professor Joseph P. Harris has rejoined the faculty of the University of California at Berkeley.

Professor John A. Fairlie, who recently retired at the University of Illinois, has been appointed visiting professor at Ohio State University for the winter and spring quarters of 1942.

At the University of Illinois, Dr. Francis G. Wilson has been advanced from associate professor to professor and Drs. Valentine Jobst III and Clyde F. Snider from associate to assistant professor.

Professor James W. Fesler has a year's leave from the University of North Carolina and is serving as analyst assistant to the secretary of the Office of Production Management.

Professor Manley O. Hudson, of the Harvard Law School, and judge of the Permanent Court of International Justice, has been appointed Anna Howard Shaw lecturer at Bryn Mawr College. In February and March, he will give six public lectures there and will participate in the Haverford-Bryn Mawr joint seminar.

Professor Raymond McKelvey, of Occidental College, has been elected president of the Pacific Southwest Academy.

Dr. Gilbert G. Lentz has resigned his position with the Illinois Legislative Council as assistant research director to accept an assistant professorship and the directorship of the public service training program at Occidental College.

Dr. Henry W. Wiens, who during the past year represented the Mennonite Central Committee at Lyons, France, has been appointed instructor in political science at Santa Barbara State College.

Dr. Bennett Rich and Mr. John J. Dautrich have been added to the political science staff at the University of Pennsylvania.

Dr. Edgar B. Cale, instructor in political science, has received the Penfield fellowship award at the University of Pennsylvania and will spend the coming year in travel and study in South America.

Professor Charles H. Titus, of the University of California at Los Angeles, is now serving as public relations officer of the 4th Army, with headquarters at the Presidio in San Francisco. Mr. Earl W. Hanson, of the University of Illinois, has been added to the department staff at the University.

Dr. Fred V. Cahill, who received his doctor's degree at Yale University in June, has been appointed instructor in political science at the University of Oregon.

At the University of Missouri, Dr. Chesney Hill has been promoted to the rank of associate professor.

Mr. Paul L. Beckett, formerly research associate in the Bureau of Governmental Research at the University of California at Los Angeles, has accepted a position as executive-secretary of Town Hall, a downtown Los Angeles civic organization patterned after the Commonwealth Club of San Francisco.

Dr. Richard W. Van Wagenen, who received his doctor's degree at Stanford University in June, has been appointed instructor in government at Yale University.

Hobart College and William Smith College (affiliated institutions) announce the appointment of Mr. Seymour Dunn, recently research associate in political science at Cornell University, as assistant professor of political science.

Dr. Wallace Mendelson, recently of the University of Missouri, has received an appointment at the University of Illinois.

At New York University, Dr. Ray F. Harvey has been made an assistant professor of government in the Washington Square College and in the graduate school, and Dr. William J. Ronan has been made an assistant professor of government in the Washington Square College and assistant director of the graduate division for training in public service.

During the current academic year, Bryn Mawr College and Haverford College are offering a joint graduate seminar dealing with the political, legal, and economic problems of world reconstruction. The seminar is in charge of Professors Benjamin Gerig of Haverford and Helen Dwight Reid of Bryn Mawr.

At the University of Tennessee, where Dr. Kenneth O. Warner has become chairman of the department of political science (lately separated from history), Professor Lee S. Greene will henceforth devote full time to teaching, although continuing as a consultant to the T. V. A. Other members of the newly organized department are Drs. Paul K. Walp and Ruth Stephens.

A grant by the Carnegie Corporation of New York has been awarded to Dr. Robert M. W. Kempner, Institute of Local and State Government, University of Pennsylvania, for research in National Socialist administration, with special reference to the world-wide police system. Dr. Kempner has served as special consultant in the same field to federal and state authorities during recent months.

The members of the staff in history and political science at Iowa State College have issued a series of eight bulletins on "The Challenge to Democracy." Professor John A. Vieg writes on "Democracy on Trial," and Professor H. D. Cook on "Toward a Better Public Administration."

The twenty-first annual meeting of the National Council for the Social Studies will be held at Indianapolis November 20–22. Professor Howard White, of Miami University, is chairman of a committee which is arranging a symposium on civic education to be sponsored jointly by the Council and the National Foundation for Education.

Federal, state, and local governmental personnel workers will gather in Jacksonville, Florida, October 27–30, for the thirty-third annual meeting of the Civil Service Assembly of the United States and Canada. The chief topic for discussion during the four-day meeting will be the effect of national defense activities upon the general field of public personnel administration.

Since February, 1940, Professor Helen Dwight Reid, formerly of the University of Buffalo, has been taking the place of Professor Charles G. Fenwick of Bryn Mawr College. Professor Fenwick is spending most of his time in Rio de Janeiro, serving as the United States member of the seven-man Inter-American Neutrality Commission which represents the joint interests of the twenty-one American republics during the war. In the summer of 1941, Professor Reid was a member of the Fourth Conference on Canadian-American Relations at Queens University, was the Latin-American expert at Lehigh University's Institute of Politics, and gave addresses at the Institute of Public Affairs at Charlottesville and at the Institute on World Organization at American University. Professor Fenwick will be in residence at Bryn Mawr during a portion of the present year.

A National Opinion Research Center has been set up at the University of Denver, sponsored by the University and the Field Foundation of New York. As listed in the announcement, the purposes of the new Center are to establish the first non-profit, non-commercial organization to measure public opinion in the United States, to make available to officials, legislators, and non-profit organizations a staff of experts in public opinion measurement, to analyze and review the results of other surveys, to discover, perfect and test new methods and techniques for the management of public opinion, and to provide the University with a new graduate department devoted to the new science of public opinion measurement. Mr. Harry H. Field, associated with Dr. George Gallup for six years, will be in active charge.

The establishment of an Institute of Public Service at the University of Chicago, making special training in various aspects of government available to the 125,000 public officials and public employees in the Chicago metropolitan area, was announced during the late summer. Opened in October, and conducted at the University's downtown center, the Institute will flank the professional courses in business and in the Institute of Statistics which the University inaugurated a year ago to meet the growing need in business and government for statistical fundamentals. A certificate of public administration will be awarded students satisfactorily completing an approved course, providing they have attained a bachelor's degree or an acceptable equivalent in terms of public service.

The U. S. Department of Justice has announced, and the Immigration and Naturalization Service (lately transferred to that Department) will sponsor, a liberally financed program of education in citizenship, aimed primarily, but not exclusively, at the alien population of the country. The program will supplement and amplify such projects now in operation in most states and will establish projects where they are not now going on; and it will operate largely from state offices of a recently created National Advisory Board, with only a small supervisory force stationed in Washington. Included in the five-man National Board are Drs. Marshall E. Dimock, associate commissioner of the Immigration and Naturalization Service, and Henry B. Hazard, director of research, information, and education for the Service; and the general director will be Dean William F. Russell, of Teachers College, Columbia University. On invitation of the Board, the American Political Science Association is participating through a counseling committee which was in process of formation when this issue went to press.

The Committee on the British Sessional Papers, a special committee of the Committee on Historical Source Materials of the American Historical Association, has made an agreement with the Readex Microprint Corporation of New York to issue a microprint edition of the British House of Commons Sessional Papers. The agreement has the unanimous endorsement of the Executive Committee of the American Historical Association, and by it the Readex Company will issue the nineteenth-century volumes of the collection, more than 5,800 in number, at a price of $5,000 per set, providing a minimum of twenty-five subscriptions or their equivalent can be obtained. This price is about one-half of what it would be if the volumes were issued in microfilm; and the original volumes, were they obtainable, would cost upwards of $20,000. The set will be collated to insure completeness and edited as to arrangement to conform to the official binding and foliation. It is planned to issue the volumes for the first thirty years of the nineteenth century by next summer, and the remaining volumes of the century will be issued in the course of a four- or a nine-year period, depending on whether or not a Foundation can be induced to assist libraries with restricted budgets. For further information concerning the project, address Edgar L. Erickson, 317 Lincoln Hall, University of Illinois, Urbana, Illinois.

Two months before his death from a heart attack on August 4, Dean **Charles Wooten Pipkin** said in an address to the graduate student body of Louisiana State University: "The dynamic thought of scholarship is to create a humane society on earth. The long, last quiet thought of all of us is that the good life of man can be achieved." It was a revealing pronouncement of his educational creed and a constantly recurring motif in the voluminous writing which he left. Dean Pipkin was born in Little Rock, Arkansas, on November 4, 1899. He received his A.B. degree from Henderson-Brown College in 1918, and his M.A. from Vanderbilt in 1919. After three years as a graduate student at Harvard, he was awarded a Rhodes scholarship and received the degree of D. Phil. from Oxford University in 1925. In the same year, he was appointed to the government faculty of Louisiana State University, in which department he taught courses in international politics until his death. This service was interrupted twice—during 1929–30 he studied at the Sorbonne as a Carnegie fellow in international law, and during 1931–32 he served as visiting professor of social legislation at Columbia University. At various times he taught during summer sessions at the University of Texas and the University of Virginia. In 1931, the Louisiana State University graduate program was reorganized and Dr. Pipkin was named the first dean of the Graduate School. From that time forward his primary concern was the development of graduate study and scholarly activity in his own institution and throughout the South. Testifying to his success in this part of his career are a number of publications, activities, and causes which he espoused. Among these are the joint editorship of the *Southern Review*, publication of *The Duty of the Educated Mind* (1936), *A Survey of Graduate and Research Work in the South* (1937), and service on a number of important educational committees and conferences, including the Commission on Improvement in Graduate Instruction and the presidency of the Conference of Deans of Southern Graduate Schools. At the time of his death he had just completed a further analysis of graduate work in the South in collaboration with A. B. Bonds. Dr. Pipkin's principal publications were issued before he was charged with administrative duties. His published works include *The Idea of Social Justice* (1927); *World Peace is Not a Luxury* (1927); *Social Politics and Modern Democracies* (2 vols., 1931); and *Social Legislation in the South* (1934). He was a member of the Executive Council of the American Political Science Association from 1927 to 1930, served as a member of the Board of Editors of the *American Political Science Review* from 1930 to 1934, was a member of the Executive Council of the American Society of International Law from 1937 until his death, and at one time or another was a member of the American Commission at Geneva, of the United States Department of Justice Research Council on Effects of the Eighteenth Amendment, the President's Conference on Home Building and Home Ownership, the White House Conference on Social Legislation, the Social Science Advisory Committee of Twelve in the United States Department of Agriculture, Industry Committee Number Two of the United States Department of Labor, the Southern Regional Committee of the Social Science Research Council, the National Committee of the Council on Southern Regional Development, and the President's National Emergency Council Committee on Southern Economic Conditions. In the death of Charles W. Pipkin, students and faculty of Louisiana State University lost a kindly and generous counselor, Southern education lost one of its most vigorous supporters, and the political science profession lost one of its most brilliant members.

BOOK REVIEWS AND NOTICES

From Luther to Hitler; The History of Fascist-Nazi Political Philosophy. BY WILLIAM M. MCGOVERN. (Boston: Houghton Mifflin Company, 1941. Pp. ix, 683. $4.00.)

This book essays a worth-while and difficult task—an analysis of the ideological roots of fascism. Professor McGovern's thesis is that the ideology of the Nazi and Fascist leaders is merely a popularization of a political tradition which has been developing for four hundred years; thus a knowledge of this tradition may enable us to understand "the true nature" of fascism and to predict its future developments. This thesis may startle those who emphasize the fascist repudiation of Western traditions; but the author establishes a *prima facie* case for it by defining fascism as authoritarianism plus *étatism* and pointing out that authoritarian and étatist political philosophies have been common in Western thought.

Most of the book is devoted to analyses of various schools of étatist and authoritarian theory. Part I deals with early modern defenses of absolutism and the conservative reaction to the French and American revolutions. Part II traces the idealists from Kant and his "disciples" Green and Carlyle through Fichte and Hegel. Part III analyzes other movements which influenced fascist ideology: traditionalism, irrationalism, "Social Darwinism," eugenics, and racialism. Part IV discusses the political philosophies of Italian Fascism and National Socialism.

Parts II and III contain much useful material not easily found in other secondary sources, but it is difficult to keep main lines of development easily in mind. The reviewer cannot agree with the editor of the series that the inclusion of "phases of thought that are not altogether apposite to the main purpose gives the book additional value." There are several surprising omissions. Machiavelli and the early *raison d'état* tradition are ignored; the influences of German romanticism and socialism are not separately analyzed. Pre-Nazi synthesizers like Carl Schmitt and Moeller van den Bruck are not mentioned.

To establish the author's thesis, it would be necessary to show that the fascist type of *étatism* and authoritarianism derives from the same premises as previous étatist and authoritarian philosophies. But his analysis of fascism shows that, while it rests directly on irrationalism and "Social Darwinism," its premises have little in common with those of the idealists and traditionalists, and still less in common with those of earlier absolutists. Failure to distinguish clearly between basic assumptions and the doctrines deduced from them enables him to suggest a degree of continuity which dissolves upon closer examination. For example, although on page 617 "we find the Nazis quietly taking over the basic assumptions of . . . the idealists," on page 620 the Nazis reject metaphysical idealism and the idealistic interpretation of history, and on page 624 "it is obvious that the Nazi brand of idealism differs from all the older theories of idealism" in being based on irrationalism and "Social Darwinism." To this reviewer, the difference between rationalist and irrationalist premises seems vitally important.

The analysis is often confused by the mechanical classifications which the author employs. To say, for example (p. 12), that democracy is simply majority rule, without any necessary connection with individualism, is to deprive this concept of any theoretical content. Professor McGovern also tends to assume that any idea that now supports fascist theory must have been at least "semi-étatist" or "semi-authoritarian" in whatever context it first appeared. What he calls "semi-étatism" in Green, for example, is in fact that recognition of the necessary interplay between individual and community which present-day liberals are rightly attempting to integrate with liberal respect for individual rights.

Another source of confusion is the use of ambiguous generalizations which suggest interpretations contradicted in the more detailed discussions. For example, on page 131 we read that "in each and every case the spread of idealist doctrines . . . coincided with the spread of belief in *either étatism* or authoritarianism—very frequently with the spread of belief in *both*. . . ."; on page 133 we find Kant, Green, and Carlyle classified as "semi-étatists and semi-authoritarians," who unconsciously served as "the advance guard" of fascism by breaking down the resistance of their own disciples to the later attack of the "thoroughgoing étatists and authoritarians"; on page 155 Mr. Lindsay and Mr. Barker are introduced as outstanding present-day idealists. One might fear that these scholars are now unconsciously undermining British democracy; but since Professor McGovern's detailed analysis of Kant and Green reveals them as pretty good liberals after all, we may perhaps still have confidence in Mr. Lindsay and Mr. Barker.

JOHN D. LEWIS.

Oberlin College.

Rousseau and Burke. BY ANNIE MARION OSBORNE. (New York: Oxford University Press. 1940. Pp. 272. $3.75.)

Rousseau and Burke are usually thought of as implacably opposed to each other. Miss Annie Marion Osborne argues that the contrary is really true; that on the fundamentals of their thought the two writers are at one. She holds that the differences between them lie rather in their method of thinking and in the presentation of their thought.

This is a challenging thesis, and Miss Osborne has achieved considerable success with it. She has argued it ably. Yet it seems to the reviewer that she has stated her contention in stronger terms than the facts justify, although this is very much a matter of evaluation. Religion was at the very foundation of Burke's political ideas, but with Rousseau religion was not a basic notion that gave shape and color to the whole of his thought; it was brought in rather as a support for his views. Burke was concerned with liberty, but with Rousseau liberty was a passion. These are differences of degree, to be sure; but such differences can be as significant as differences in kind. Still more important are the ideas on which there is basic disagreement. Burke believed in the wisdom of our ancestors, but Rousseau was no prisoner of prescription. Rousseau stood for equality, opposed privilege, and bitterly attacked the property system of his time. Burke stood essentially for inequality, defended the privileged aristocracy, and strongly supported the property order of his day. Rousseau was above all the champion of popular sovereignty and of self-government; Burke was the uncompromising opponent of these ideas. Miss Osborne is aware, of course, of these differences, but she does not attach a great deal of weight to them. Nevertheless, in spite of what seems an over-statement of her thesis, we are indebted to her for bringing out the common elements in the thought of Rousseau and Burke, and for showing the conservative side of Rousseau. Both of these things needed doing.

Rousseau and Burke is an historical study. Nowhere is this more clearly shown than in the chapter on the General Will. Miss Osborne describes the General Will and Rousseau's notions of the state more or less as Rousseau would have described them had his mind been free of paradox and interested in consistency. No account has been taken of the criticism that has been made of these doctrines since Rousseau wrote. There is no recognition, for example, of the criticism of Hobhouse, Ginsberg, Laski, and Carritt. Either the chief criticisms of these writers should be met or an acceptance of them shown. At one or two places in her text, Miss Osborne seems aware that Rousseau's doctrines cannot be taken at their face value, but for the most part she writes about them as if they were true descriptions of reality, and as if they had enabled Rousseau to solve important political problems. Surely the clarity of our thinking is not advanced by speaking of the state as a moral being with a life of its own; nor is it true, as Miss Osborne thinks it is, that Rousseau has solved the problem of political obligation through his notion of the General Will. Carritt, in his *Morals and Politics*, has shown that in the last analysis a man's willingness to obey, in Rousseau's view, rests on self-interest, which is to say that there is no obligation whatsoever, and that the problem is not solved but left where Hobbes left it.

In her preface, Miss Osborne says that her special purpose in writing on Rousseau and Burke was to show how their thought applies to modern times, but this purpose is not carried out to any considerable extent. Miss Osborne also says in her preface that the main problem of politics is the dominance of the state. Surely the main problem is how to stop the Nazi tyranny, the tyranny of a party and of an ideology. And if this is thought of as a temporary problem, then the important long-term one would seem to be twofold: how to organize our economy so as to provide for an adequate standard of living, and, at the same time, maintain our essential liberties; and how to secure an effective international system so that world wars will not be fought every generation.

But these criticisms are minor, and have little bearing on the main body of the book. As we have indicated, the volume is devoted largely to historical analysis. Next to showing what Rousseau and Burke had in common and the conservatism of Rousseau, the chief virtue of Miss Osborne's work is her portrayal of the historical background of these two writers. She has done an admirable job in revealing the intellectual roots of Rousseau and Burke, tracing the origins of their thought back to the seventeenth century.

BENJAMIN E. LIPPINCOTT.

University of Minnesota.

Marxism; Is It a Science? BY MAX EASTMAN. (New York: W. W. Norton and Company. 1940. Pp. 394. $3.00.)

Of all American intellectuals with an intimate contact with Marxian thought, Max Eastman represents the longest span of such mental experience as well as the most penetrating thinking and observation, the latter covering many years of residence in Moscow. Regardless of the emotional impelling forces which have brought many splendid minds into the Marxian fold, Eastman found in Marxism above all the answer to his quest for a thoroughgoing science of history and of social institutions. But, unlike other intellectuals who permitted themselves to be so bedazzled by the blinding light emanating from the Holy of Holies of the Marxian temple as to produce an intellectual acquiescence in the dogmas of the new religion, Eastman not only was able to perceive the large ingredient of animistic theology in the Marxian system of thought, but also proved emotionally capable of accepting this perception. In this he differed radically from his friend Leon Trotsky, to whom he devotes Part VII of the present volume under the heading "Trotsky Defends the Faith." Eastman sees no reason why energetic action to bring in a new system must depend upon a faith that the deity of history is watching over these builders of the future and has unalterably underwritten their final success. At one time, Eastman felt convinced that Lenin merely posed as a Marxian in the theological sense Marx inherited from Hegel, but was in actuality a scientific engineer concerned, not with prophecies, but with builder's blueprints, analyses of the building material to determine plasticity or refractoriness, and the related worries of the practical engineer. During that phase, Lenin's engineering was to him one of universal applicability and the building material for the Lenin structure equally available in all countries that had undergone the capitalist transformation.

It is puzzling to the reviewer why such a brilliant man as Eastman, to whom philosophy and history are equally open books, was unable to discover that Lenin's engineering feat in Russia, far from being one of the wonders of human achievement, was in reality a mediocre accomplishment. In Russia, for historic reasons, the communist social engineer found himself in a position to work his will upon an ultra-passive community. The Russia of 1917 issued from an historic mold vastly different from the one which has shaped the Western nations. Russia missed several shaping influences of decisive importance such as a genuine feudalism with its historic deposit of a landed gentry with an effective will to power, and the municipal stage with its guilds and companies serving as the cradle of a vigorous middle class. In addition, Russia's peasantry, nurtured in the institution of collective land ownership under the "mir," and therefore most unlike the peasantries of the Western countries, not only offered no resistance to the abolition of capitalism, but was impelled by its land hunger to side with Lenin. Finally, Russia's industrial working class, deprived of the protection of trade unionism and effective labor legislation, was a veritable tailor-made proletariat in the Marxian sense, as contrasted with Germany's working class, which, in the critical years 1918–20, arrayed itself under its trade union leadership on the side of conservatism. In brief, Lenin, while he operated upon Russia, dealt with ultra-plastic stuff; but when he tried the same engineering plan upon Western Europe, he met instead a most refractory material which defeated him and his imitators finally and conclusively.

It is perhaps unfair to criticize an author for not having done something which was not his declared purpose to do, but the reviewer regrets that such a mind as Eastman's, instead of engrossing itself upon a task of clearing the Augean stables of Marxian intellectualism and pseudo-intellectualism, has not directed itself to a more concrete and comprehensive examination of the problems of engineering of social institutions. The answer seems to lie in the propensity of the intellectual's mind to embrace a social theology which gave rise to the necessity of concentrating upon this job of demolition.

The two essays in Part V, "What Science Is" and "The Seeds of the Marxian Philosophy," are entirely new, the remainder being adaptations of earlier writings.

SELIG PERLMAN.

University of Wisconsin.

Government in War-time Europe. EDITED BY HAROLD ZINK AND TAYLOR COLE (New York: Reynal and Hitchcock. 1941. Pp. x, 249. $1.50.)

The nine separate studies in this volume, each by a distinguished American political scientist, are extended versions of as many papers on the belligerent European scene presented by the authors at one of the round tables of the 1940 meeting of the American Political Science Association. Their subject-matter covers roughly the period from the outbreak of war in the summer of 1939 to the German occupation of the Balkans. The first two of the nine studies, prepared by Professors E. P. Chase and W. H. Wickwar, deal with Great Britain; and the two which immediately follow, from the pens of Professors F. M. Marx and Taylor Cole, are devoted to Nazi Germany. Comprising considerably more than half of the entire volume, these four studies are substantial monographs depicting the impact of the war upon the governmental and administrative establishments of Europe's two principal belligerents and the war's influence upon the evolution of their respective economies and national policies.

The remaining five studies deal with areas of embattled continental Europe outside of Germany proper. In one of these, Professor John N. Hazard places students in his debt for his analysis of the advancing authoritarianism of the Soviet régime and for his description of the assimilation of the territories which the U.S.S.R. annexed during 1939 and 1940. In another, Professor William Ebenstein deals with the growing disesteem into which Fascism has fallen in Italy as a result of the war's privations and defeats, and with the reign of terror to which Fascism is resorting in order to remain in the driver's seat. In still another, Professor J. G. Heinberg treats of the dubious national foundations of the Pétain régime in unoccupied France and of that régime's somewhat nebulous constitutional organization. A brief summary of Axis conquest and power politics in the Balkans, contributed by Professor Joseph S. Roucek, and a chronicle of political and constitutional developments in Sweden and Nazified Norway, by Professor A. G. Ronhovde, complete the volume.

The purpose of editors and authors was undoubtedly to provide a well-rounded and authoritative survey of the political changes which have taken place in Europe during the past two years. Many readers will, notwithstanding, be less interested in this service, however well performed, than in the clues which the volume offers to the institutional and ideological trends that the war is fostering and that are therefore likely to influence post-war reconstruction. As becomes savants, the authors, by and large, eschew the rôle of prophet; nevertheless, the future is often implicit in their observations on present developments. Those fearful of the ultimate demise of democratic institutions will take comfort from the statement of Professor Chase that so characteristic a democratic organ as the British House of Commons has "indubitably gained" from the war.

Those curious about constitutional trends among Europe's autarchies will find enlightenment in Professor Marx's description of the shift in popular support from the party to the army in Germany and of the rapid substitution of administrative experts for erstwhile politicians and rabble-rousers in the party and governmental high commands. Nor can any reader fail to grasp the implications of permanence in the vast recent extension of administrative functions and in the universal emphasis, provided in words if not in deeds, upon the promotion of social services.

One or two of the studies, probably because of the inaccessibility of official information, possess a somewhat flimsy documentary basis, contrasting sharply in this respect with the remainder of the book. The editors have achieved a satisfactory degree of unformity in the volume's content and organization, a rather remarkable feat in view of the circumstances under which the various studies were first prepared and the perennial difficulties of composite authorship.

ARNOLD J. ZURCHER.

New York University.

Concerning English Administrative Law. BY SIR CECIL THOMAS CARR. (New York: Columbia University Press. 1941. Pp. ix, 189, $2.00.)

From a wealth of information and experience, Sir Cecil Thomas Carr, who delivered a series of lectures on administrative law at Columbia University, writes of the historical background, the intricate problems involved, and the present status of the development of administrative law in England. A practical and realistic point of view is apparent in the comments and observations regarding the most persistent and controversial phases of administrative justice. It appears to be taken for granted in England that simple questions of fact can be determined swiftly, cheaply, and effectively outside the law courts. And it is also taken for granted in dealing with the consideration of delegations of administrative powers to executive officers that though lawyer-like methods find special favor with lawyers, for a judiciary to presume to impose its own methods on administrative or executive officers is a usurpation of authority. Delegations of power in England are made with little judicial scrutiny and opposition, since there is no need "to rationalize the doctrine of separation of powers or to soften it with a *quasi*." Speaking of the judges' efforts to secure the power to prescribe rules of procedure, it is noted that the judges did not object to the delegation of powers as long as the delegation was in the right hands. In fact, the principle of equality of departments on which the judges frequently insist is, indeed, hard to reconcile with the privileged position conceded to judges and sometimes also to policemen.

About twenty years ago, the author wrote an excellent little book on delegated legislation as it was developing in England. He again considers the problems involved in the delegation of power to administrative agencies and the requirements and limitations which should surround such delegation. He advises a scrutinizing committee of Parliament to examine delegations of power to the ministers and to exercise a more definite control over ministerial powers than is possible under present conditions.

The crisis powers such as were conferred by Parliament in the Defense of the Realm Act, 1914, the Emergency Powers Act, 1920, and the Emergency (Defense) Act, 1939, which require everyone in Britain to place himself, his services, and his property at the disposal of His Majesty, are analyzed so far as they affect administrative law. A clearly recognized feature of English law that war cannot be carried on according to the principles of Magna Carta has brought marked transformations in administrative practice and procedure.

The preparation of and discussions concerning the Logan-Walter bill, its passage by Congress, and the veto of the bill by President Roosevelt, along with the report on administrative procedure in government agencies by the Attorney-General's Committee, have brought to public attention some of the most important problems concerning administrative legislation and adjudication in the United States. This series of lectures gives little in the way of support to the proposals of the minority of the Attorney-General's Committee favoring the enactment of a code prescribing fair standards of duty and procedure of administrative officers and agencies. The definition of proper and fair standards for administrative action is, indeed, an issue which is as yet too much in the realm of uncertainty and of political controversy to make it likely that a satisfactory code could be drafted and enacted. In fact, Sir Cecil Thomas Carr thinks that it is a mistake to assume that a single formula for all kinds of tribunals offers an easy solution for the problems of administrative legislation and adjudication.

The fundamental issue of administrative as well as judicial justice is conceded to be that it is not enough merely for justice to be done; it must manifestly appear to be done. Due to the great amount of work to be done and the need for expeditious action, it is often difficult to operate in accord with this principle in public administration, and there is much room for improvement to accomplish the above end in administrative justice. In England, as in the United States, it is difficult to counteract the widespread belief that "bureaucrats have too little wisdom and too much power." Laboring under great difficulties to deliver the lectures and issue them in book form, due to war conditions, the author has produced a work which is truly "a monument to the finest English scholarship"; and there is no field in which there is a greater need for the kind of scholarship and practical wisdom that characterizes these lectures.

CHARLES GROVE HAINES.

University of California at Los Angeles.

Modern Democracy. BY CARL L. BECKER. (New Haven: Yale University Press. 1941. Pp. 100. $2.00.)

Democracy in Government. BY JOHN J. PARKER. (Charlottesville: The Michie Company. 1940. Pp. viii, 116.)

In several respects, these books have much in common: their size, the fact that both were originally prepared to be delivered as lectures at the University of Virginia, and the warmth with which both authors speak of democracy. But beyond these characteristics the differences between the two are more significant than their similarities. Judge Parker's book is a thoroughly conventional exposition and defense of the American system of government. Professor Becker's treatment is perhaps not to be described as original, but it is certainly not, in the usual sense, conventional. Judge Parker cites a great many political philosophers and jurists, but, except when he is considering judicial decisions, his discussions or references give evidence of hasty reading rather than of long reflection. Professor Becker's little book is clearly the highly compressed product of many years devoted to reading and thinking about the development and present condition of democracy. Judge Parker appears to believe that all that is needed today is some further improvement in the "processes" of government. The forces which have made that change necessary are not even referred to. Professor Becker is concerned, not so much with processes, as with more fundamental problems. The book of Judge Parker has little of value for most political scientists; that of Professor Becker has a great deal.

Modern Democracy was evidently chosen as a title because Professor Becker believes that democracy, as we know it, is a comparatively new set of institutions. Incidentally, it is a set that has flourished only in prosperous communities. The traditional idea of liberty which it embodies is still sound and essential in the political and intellectual realm, but it is no longer applicable to that of economics. The technological revolution has greatly intensified those disparities and uncertainties which have been present in democracies since the revolutions were over and the new orders were established. Many changes in the social and economic systems must be made if democracy is to endure. Technological progress has made starvation or subsistence existence unnecessary. The issue is not whether we shall have governmental regulation—that we have long had—but what sort and how much. Freedom to be unemployed, or freedom to be employed at a level upon which life is barely possible, will not survive just because of the old war cries. And, for that matter, the freedom of economic enterprise was, in the Revolutionary era, the idea least stressed and of least importance for purposes of propaganda. Few persons, furthermore, have ever known economic freedom. What we need, and what we must have, is time for experimentation with methods for solving some of the economic and social problems of democracy, while retaining the political and intellectual liberties. The present war situation will postpone, but it will not aid in the solution of, this problem. Yet that situation is inescapable if the states in which democracy exists are to have an opportunity to carry on their experiments.

So brief a summary cannot do justice to a book which is itself a summary. It may serve to indicate the book's surprising scope, although it will not reflect the cogency and the penetration of the discussion. The book presents a clearer and more impressive statement of the problem which inevitably confronts the democracies of the near future than any with which I am familiar. It is the only one on its much discussed subject I have read in years that I wished were longer. Because it is so compressed, and because it is consistently underwritten—there are no stylistic tricks, no rhetorical devices which give the impression of greater erudition and more intensive thought than are actually reflected—it is unlikely to have the audience that it deserves.

BENJAMIN F. WRIGHT.

Harvard University.

John D. Rockefeller; The Heroic Age of American Enterprise. BY ALLEN NEVINS. (New York: Charles Scribner's Sons. 1940. Vol. I, pp. xiii, 683; Vol. II, pp. x, 747.)

All the primary qualities which distinguish Mr. Nevins' work—painstaking research, careful organization of materials, and solidity of style—appear in the volumes before us. Of them nothing need be said here. For the serious student of history already familiar with the development of American economy after the Civil War and with the documentation of the period, two questions will doubtless seem fundamental: What materials hitherto unknown or unused has the author unearthed and commanded? Under what overarching conception of Mr. Rockefeller in relation to the circumstances of his times has the author selected, arranged, and presented his findings?

The question bearing on new materials is the more easily answered. Mr. Nevins says in his preface that he has enjoyed "the benefit of the Rockefeller family papers, generously placed at his disposal by Mr. John D. Rockefeller, Jr.," that he has used the papers of some of Mr. Rockefeller's chief opponents, and that he has interviewed many men who took part in the struggles of the time. This statement is amplified by various references in footnotes. A note on page 182 of Volume II reads: "Most business correspondence of the Standard Oil has long since been destroyed." Another note on page 725 of that volume explains that Mr. Rockefeller's "business correspondence was never extensive, and has largely been destroyed."

Respecting papers of Mr. Rockefeller's leading associates, Mr. Nevins adds: "I have been unable to obtain any exact information from the Harkness family or the Flagler estate" (Volume I, p. 251); "An effort by the author in 1936–37, several times renewed, to gain access to Rogers' papers, was met by information from an attorney connected with the estate that the business papers were being destroyed" (Volume I, p. 343). Nor does it appear (Volume II, pp. 500–515) that Mr. Nevins has had the advantage of consulting all the unpublished papers of John D. Archbold or Senator Foraker in connection with the relations of these two gentlemen and Standard Oil interests.

A careful check of the footnotes of the two volumes shows that the part of the text relative to Mr. Rockefeller's business activities is based mainly on well-known types of materials—legislative investigations, legal records, newspaper files, memoirs, and secondary works—supplemented, principally in matters of detail, by references to new sources, such as letters, memoranda, and interviews. Apart from accounts of Mr. Rockefeller's family life and his philanthropies, that is, in respect of his business activities, the new materials, whatever their nature, are not likely to alter in any fundamental way the conclusions on the outstanding controversies associated with Standard Oil interests which competent students have already drawn from sources long available to them.

And what is Mr. Nevins' overarching conception of Mr. Rockefeller in relation to the circumstances of his times? A clue is given by the title page, which reads: "John D. Rockefeller; The Heroic Age of American Enterprise." On the first page of his preface, Mr. Nevins indicates that he has attempted to meet the need for "an objective and impartial account of Mr. Rockefeller's life." On the second page, he adds: "If the author has brought any bias to his work, it was that of a convinced believer in a free competitive economy." Under Mr. Nevins' scheme of thought there was apparently no contradiction between his belief in a free competitive economy and categorical statements which he makes in the text; for example, the contest between the South Improvement Company and the oil regions was in essentials a "contest between heavily capitalized industry, seeking concentration and organization, and the individualistic, small business man; between a new economic order and the old" (Volume I, p. 338); "combination was an irresistible tendency of the age" (Volume II, p. 708); "the struggle against Rockefeller's movement for industrial consolidation was . . . largely a struggle against destiny" (Volume II, p. 709); Mr. Rockefeller "divined the real nature of economic forces," and "Rockefeller's economic vision, and the courage shown in his fidelity to it, deserve commendation" (Volume II, p. 710). Or perhaps Mr. Nevins' study of Mr. Rockefeller changed his original bias in favor of free competitive enterprise.

In dealing with highly controversial matters, Mr. Nevins occasionally seems more than duly eager to give Mr. Rockefeller the benefit of the doubt, and makes categorical statements that are not in the nature of proof or are not supported by evidence. For example, "No evidence exists that Rockefeller knew anything about Archbold's political activities. . . . The sensational press was filled with highly colored tales of the Standard's political machinations, and everybody knew that they possessed some truth. Rockefeller was not informed of these activities" (Volume II, pp. 505–515; see also Volume I, pp. 401 ff.). How does Mr. Nevins *know* that no evidence *exists* in the papers he has not been able to consult or has not consulted? How does he *know* that Mr. Rockefeller was not informed of the machinations carried on by the Company? Does he *know* that Mr. Rockefeller never read any of the newspapers which contained stories possessing "some truth"? If "everybody" knew that they possessed some truth, how did Mr. Rockefeller escape hearing about them? At all events, it may be suggested in the interest of precision that the sentence be modified to read: "Everybody, except Mr. Rockefeller, knew that these newspaper tales possessed some truth."

While Mr. Nevins scrupulously and correctly refrains from using any derogatory or belittling adjectives in dealing with Mr. Rockefeller in controversial cases, he is not always so careful in referring to parties on the other side. For instance, Mr. Nevins says that one of H. D. Lloyd's chapters seems to him "one of the most dishonest pieces of so-called history he has ever read," and that "honest study of the Regions newspapers would have shown Lloyd that . . . they were imploring the Regions men to stop disgracing themselves by acts of lawlessness" (Volume II, pp. 336–337). In speaking of the Industrial Commission which investigated the Standard Oil, among other interests, Mr. Nevins deems it fitting to characterize Senator Kyle as a "one-time preacher, and a former free-silverite and Populist," but does not, as he might, characterize in depreciatory terms, Senator Penrose, who was on the Standard's side (Volume II, p. 499). Referring to the controversy over Professor Bemis at the University of Chicago, Mr. Nevins says categorically that Mr. Rockefeller "certainly never knew or cared anything" about Bemis' teaching, and that Bemis was "bumptious, tactless, and offensive" and was besides "a trouble maker" (Volume II, pp. 263–264).

In the opinion of the present reviewer, Mr. Nevins has, by the frequent use of imprecise language and by derogatory characterizations of critics, done Mr. Rockefeller a disservice, unintentionally of course, and there is still room for an "objective and impartial" biography of that great industrial leader. This suggestion, however, is in no way designed to depreciate the value of the many correct, precise, and indubitable statements of fact which Mr. Nevins has made in his voluminous pages. There is a good index.

CHARLES A. BEARD.

New Milford, Conn.

The Pardoning Power of the President. BY W. H. HUMBERT. (Washington, D. C.: American Council on Public Affairs. 1941. Pp. 142. $2.50.)

There have appeared, in the years since the adoption of our constitution, several outstanding commentaries on that document. Writers have turned their attention to phrases or words in the "supreme law of the land" for the purpose of clarification, only to emerge from their labors burdened with great masses of minutiae. Mr. Humbert has avoided the pitfalls of "aimless erudition" and "popular generalization." He has struck the happy medium of presenting his material in straightforward fashion, yet in language factually meaningful to both layman and legalist. Such an accomplishment deserves recognition.

The present volume is not one which will reach a large audience, for it is a study of a single aspect of the vast domain of executive authority. But the teacher of American constitutional law will do well to read the work because of the precision, care, and historical perspective found throughout it. The opening chapter presents, in adequate fashion, an historical approach to the pardoning power of the president, leaving a world of suggestions for further study by the curious reader, yet providing a solid "frame of reference" for the ensuing pages. Chapter II completes the "frame of reference" by a meticulous definition of terms—a process too often neglected by political scientists. Then follow two chapters devoted to the constitutional and legal aspects of the pardoning power. The "case sources" are admirably supplemented by material of a biographical and secondary nature. To the present reviewer, Chapters V and VI were of the greatest interest. Here the author takes us behind the bulwarks of legalism and gives us a glimpse of the administration of the pardoning process. In these pages the president's pardoning power is seen to be a functioning, vital activity rather than a cold and impersonal grant of authority.

Mr. Humbert's conclusions, while not startling, are worth emphasis. He believes, and with sound evidence, that "better use of the pardoning power, not abandonment of it, should be sought." More positive and corrective use of this executive authority would work to the advantage of the administration of justice. Mr. Humbert's position in the closing pages of the monograph will give added hope to those who have been urging that we should deal with the criminal rather than with the crime, particularly in connection with the pardoning process.

It is to be hoped that the American Council on Public Affairs will see fit to publish more volumes of this nature. Certainly not all of the American constitution can be treated by this monographical method. But significant areas remain unexplored and should be susceptible to such treatment. By the gradual accumulation of detailed factual studies, the American constitution may be more clearly understood.

ETHAN P. ALLEN.

State University of Iowa.

The New Centralization. BY GEORGE C. S. BENSON. (New York: Farrar and Rinehart. 1941. Pp. xii, 181. $1.00.)

In twelve short chapters and a shorter epilogue, Professor Benson presents and analyzes the major problems created by the existence of several levels of government in the United States. The standard arguments for and against centralization are listed and considered, and the more common proposals for reform are made the subject of brief comment. The author scarcely succeeds in his avowed purpose, i.e., to "present new points of view to others"; but at least he discusses the old points of view in an ingratiating manner.

If the editors of *Reader's Digest* were asked to cut down this volume to the size of one of their articles, they might perhaps do so in the following manner:

The American system of political decentralization has important values—values fundamental to the political, social, and economic life of America as we have known and now know it. On the other hand, this same system has failed and frustrated us at many points. In an attempt to meet new situations and new dangers, a shift in the old governmental pattern has been taking place. Some of the changes may be deemed good, others bad. One of the most serious charges which can be leveled at the process is its over-all lack of destination. But students of government have been attempting to formulate various remedial plans for a permanent readjustment.

Areas of local units should be increased to sizes more consistent with the administration of contemporary governmental functions. At the same time, state governments should improve the quality of supervision of localities. Local fiscal differences should be equalized, and this result should be achieved, at least in part, by a system of block grants based on objective criteria and conditioned on certain standards of administrative efficiency. State governments should coöperate to eliminate interstate evasion and competition, and state standards of legislation and administration should be improved. Direct federal-local relations, though not intrinsically desirable, should not be discouraged at present. Increased federal activity in certain fields is necessary, and should not be considered a threat to our decentralized system. There are, however, some functions —police protection and education, for example—that should be kept in state and local hands, though unconditional grants from the federal treasury in support of these services would be acceptable. Some form of federal administrative regionalism should be encouraged. The administrative procedures of many federal agencies should be regularized.

Block grants from the federal treasury to the states, distributed on objectively determined criteria of need and conditioned on standards of general administrative efficiency, would probably be desirable. Performance of certain basic services might also be required. Each extension of the present functional grant system should be critically appraised to determine its effect on the federal system. The administration of grants-in-aid should permit genuine experimentation and adaptation on state and local levels, but should also be designed to secure administrative efficiency and rapid exchange of ideas.

AUSTIN F. MACDONALD.

University of California.

Federal Departmentalization. BY SCHUYLER C. WALLACE. (New York: Columbia University Press. 1941. Pp. ix, 251. $2.75.)

In a well written and scholarly monograph, Professor Wallace has presented a rather pessimistic picture of the scientific future of public administration. As he puts it, "It is problematical at least whether administration will ever attain the status of a true science" (p. 237). To make his point, he examines the various alternatives advanced in recent years by various so-called experts in the field of public administration with reference to the organization of the administrative branch of the federal government. His analysis of the divergent proposals demonstrates that each has its good points and weaknesses. Which one will be chosen in a given case depends, he believes, upon the education, experience, and predilections of those who have power to make the choice. The result is not based upon scientific principles, but upon inarticulate major premises—assumptions—hypotheses—few of which have been verified or are capable of verification.

If one accepts Professor Wallace's definition of a science, he is well nigh compelled to arrive at the same conclusion. It would seem, however, that he is attempting to apply to a social science the yardstick appropriate to astronomy, mathematics, or physics. The practitioners of these sciences would be the first to deny the immutability of the so-called scientific laws which circumscribe their activities. But it must be admitted that they have travelled farther along the road of verification of their basic assumptions and hypotheses than have the social scientists. It is difficult for the writer to share Professor Wallace's pessimism. Probably the social sciences must borrow generously from the assumptions and verified hypotheses of psychology, genetics, and human biology. Perhaps it must even share in the work of formulating and verifying such assumptions. But the future looks bright and challenging.

Could it be that Professor Wallace is deliberately aiming his barbs at administration, but not at the other areas of political science? It would seem to the writer that politics, theory, public law, comparative government, and the other areas which constitute the recognized field of political science would have at least as much difficulty as administration in establishing their claim to recognition as exact sciences.

But Professor Wallace has performed a useful service in challenging the dogmatism and *ex cathedra* attitude of many writers. Value judgments are common in most political science texts. Even where they are not found in the text, they are supplied by the teacher. A modicum of humility in presenting personal conclusions seems required by good taste. But to deny to students the benefit of personal views on public questions—and the assumptions on which they are based—would deny a basic obligation of the teacher. Absolute objectivity and impartiality in dealing with such subjects as democracy and autocracy is hardly to be expected in a nation engaged in quasi-war.

All teachers and students of public administration should read this book. It will make them angry. It will make them think. It may make them more careful. It should make them better political scientists—and should result in an ultimate advance in the scientific status of our professional field.

HARVEY WALKER.

Ohio State University.

Congressional Procedure. BY FLOYD M. RIDDICK. (Boston: Chapman and Grimes, Inc. 1941. Pp. xix, 387. $4.00.)

Just as wisely as the fathers defined and lodged powers under the Constitution, they left procedural responsibility of the national legislative body to each house, or, in part, through joint action, to both of them. Merely to say that the average Congress within a period of two years is called upon to consider between twenty and thirty thousand legislative proposals fails to tell the story. Of these proposals, some reach to the very life or death of the republic, others only to a private claim of "Mr. Jones," and others fall in between. Obviously some means must be devised for sorting out as impersonally as possible the important from the trivial, and that will give the former priority of consideration. Regard for the former spells statesmanship; attention to the latter may be essential to individual or party success.

The story of how Congress does this is Mr. Riddick's task. In a legislative body there must be debate, yet there must be action: the minority must be heard, yet the majority must assume responsibility. The individual members of majority and minority must feel that on the whole they have been fairly dealt with, both individually and as groups. The means by which all this is done is called "congressional procedure." Mr. Riddick points out that because of its great size the House must have rules that are more definite than the rules of the Senate.

The author traces step by step the technique of House practice; party responsibility and its exercise through caucus and conference; the power of the speaker, floor leaders, steering committees, and whips. He considers the committees of the House, their appointment and their significance. Following this he analyzes the House calendars, which, with the stripping of power from the speaker in 1909, have become the great agencies in the winnowing-out process. The reader will observe that the private and unanimous consent calendars, together with Calendar Wednesday, take over quantitatively the bulk of the business of the House, yet only a small part of the business when measured by importance. For these calendars, the time consumed is about ten days out of every month, and often less. This leaves most of the time for major legislation.

The author discusses the Rules Committee and its peculiar power. This committee could better be described as a "Rules Calendar," for its essential responsibility lies in presenting special rules from time to time which make possible the consideration of highly important matters that otherwise would be blocked for indefinite periods.

Having developed the mechanics of House procedure, the author uses his study as a background for the simpler and less formal practice of the Senate. He does not fail to discuss the conference committees, with their definite responsibility, and their exercise at times of highly arbitrary power.

Mr. Riddick has done a scholarly piece of work. The volume should be on the reference shelf of every teacher of government and student of the legislative process.

BURTON L. FRENCH.

Miami University.

Government and the American Economy. BY MERLE FAINSOD AND LINCOLN GORDON. (New York: W. W. Norton and Company. 1941. Pp. 863. $3.90.)

Part I of this volume presents the economic, organizational, legal, and constitutional setting in which American enterprise has developed. The three succeeding parts deal with the relation between government and economic life during the last half-century. Consideration is given the impact of World War II on our economy.

Discrimination characterizes the selection of illustrative material, and the authors have organized compactly the material selected. A critical sense of proportion and balance is maintained throughout the book. The method is revealed in the analytical approach to the relation and interrelation of the primary economic fields (agriculture, business, and labor) and to the trends and developments in private practices and public policy designed to cope with those trends and practices. The shifting policy from aid to economic enterprise to regulation to participation in economic enterprise bespeaks Darwin rather than Newton. Philosophical aspects of motivation are intelligently recognized, despite the minor consideration that can be accorded them, whether discovered in private practices or in public policy.

In stressing the significant change in government attitude from negative to positive, be it in the field of business, agriculture, labor, or consumers, the authors not only depict the dynamic character of motivation, but also intellectually condition the reader to the implications of inevitably increasing incidence of government upon economic processes in the future. While their attitude is pragmatic, they neither decry nor adulate.

Because of its positive qualities, this book easily places first in its field. It should make a wide appeal to all students of current federal politics.

JOHN J. GEORGE.

Rutgers University.

Administration and the Rule of Law. BY J. ROLAND PENNOCK. (New York: Farrar and Rinehart, Inc. 1941. Pp. xii, 260. $1.00 college edition, $1.50 trade edition.)

Professor Pennock's account of the evolving relation between administration and the courts is judicious and readable. Salvation, as he sees it, lies within the existing scheme of regulatory tribunals, rather than in resort to any novel prescriptions. Thus on the mooted question whether rule-making and adjudicatory functions should be lodged in different sections, he concludes that "the decisions, and the gradually developing rules which grow out of them, are likely to be much sounder if they are made by men thoroughly familiar with the particular subject-matter concerned, and if they are made by the same men who, through the rule-making power, have formulated the standards to be applied" (p. 112). He recognizes the possibility of trial examiners being fired with a zeal to pervert, but recommends only such safeguards as "proper attention to the separation of functions within the commission" and greater independence of tenure (p. 113)—with which the majority of the Attorney-General's Committee on Administrative Procedure are in accord.

As to administrative finality, the author insists upon no simple formula, stressing rather the diversity of matters subject to official control. There are situations, as when administration impinges upon the liberty of person, where independent judicial scrutiny is, on balance, productive of good. There are others, such as rate regulation and workmen's compensation, where a specialized administrative agency is more apt to make an intelligent adjustment of interests. As a regulatory tribunal perfects its processes—as to which Dr. Pennock makes understanding suggestions—the courts concede it a larger portion of the field. The Supreme Court as now constituted views the administrative process with no jaundiced eye as in the days of Ben Avon Borough, Crowell v. Benson, and the St. Joseph Stockyards Case—a development which the author approves.

The book is evidently directed primarily at that portion of the public whose reading is selected for it by college professors. Accordingly it steers a happy course between abstruse refinements and loose simplification. The argument is reflective without being obscure, and the style is facile. Judicial formulations such as the category of "constitutional questions" are presented as the rationalizations which they are, but without resort to patronizing smartness. Perhaps the student would profit by knowing with some particularity how a few typical administrative tribunals operate, but this is the sort of illustrative material which each instructor may present in his own way. The book will be understandable to beginners for whom John Dickinson's monograph, *Administrative Justice and the Supremacy of Law*, would be too difficult and the *Final Report* of the Attorney-General's Committee too technical. It sets a high standard for Professor Bradley's series on "American Government in Action."

CHARLES FAIRMAN.

Stanford University.

Democracy or Anarchy? A Study of Proportional Representation. BY F. A. HERMENS. (Notre Dame, Indiana: The Review of Politics: 1941. Pp. xxx, 447. $4.00.)

To explain the collapse of democratic institutions in Europe, political scientists have taken to economics, psychoanalysis, ethnology, and mysticism, and have generally avoided political science. Mr. Hermens, however, challenges the contemporary prejudice against attributing importance to political institutions, and argues that representative government broke down only where there was a fault in the fundamental political institution—the electoral system. That fault, he says, was proportional representation.

Democracy or Anarchy? first discusses the theory of electoral systems and then describes the historical results of the majority system in Great Britain and France, the effect of P.R. on various nations, and the experience of American city governments with P.R.

The section on the United States is the least satisfactory in the book, not because Mr. Hermens' arguments about P.R. in American cities are less cogent than those of his opponents, but because, as he admits, the effects of P.R. in a city are necessarily limited. And when he undertakes to discuss the respective merits of the various forms of P.R., Mr. Hermens' arguments seem nearly as involved as his subject-matter.

On the general theory and on the experience of European nations, however, Mr. Hermens' study is impressive. He begins with the argument that the function of legislators is not to "represent" the particular voters who chose them, but to participate in a government responsible to the entire electorate, and that the groups to which P.R. would give representation are not entities with a right to independent political existence. Under the majority system, minorities are represented, but only after they have signified their willingness to coöperate and compromise by joining one of the two sides in an electoral campaign; under P.R., they are assured of a foothold within the legislature from which to sabotage administration if they prefer not to compromise.

Mr. Hermens agrees with the advocates of P.R. that P.R. permits legislators to win and hold their seats by standing on definite political principles because the voters are not required, as they are by the majority system, to choose the "lesser evil" between two parties. But Mr. Hermens insists that compromises are essential to the democratic process of bringing together a responsible majority and that such compromises will be made only during a campaign if the political leader has to appeal to the marginal moderate voter to get a majority, never under P.R. after a campaign, when entrenched fractional leaders will hold to their divergent principles in order to justify their existence. The electoral system, he argues, has a dynamic and sometimes decisive effect on the nature of politics, and while the effect of the majority system has always been centripetal, P.R. is a strong centrifugal force.

The illustrations of this argument from Italian and German experiences are the heart of the book. By comparing the results of P.R. with those of a hypothetical majority system on the basis of the votes actually cast, Mr. Hermens shows that P.R. gave the Fascists and Nazis seats that they could not have won in single-member districts, enabled them to prevent the formation of responsible ministries and thus to discredit the efficiency of democracy, and provided them with Communist legislative blocs by which to frighten the moderates into extremism.

For example, in the 1930 Reichstag election, the last in which Nazis and Communists together won less than the majority that later enabled them to make government impossible, the Nazis won nearly one-fifth of the seats through P.R., when they did not poll a majority in a single one of the 400 individual constituencies into which Mr. Hermens hypothetically divides Germany.

The German experience brings us to the heart of the difference between the views of Mr. Hermens and those of the P.R. advocates with whom he has been debating. Mr. Hallett, of the National Municipal League, believes that Hitler came to power through a defect in the proportionality of representation in the Reichstag: if the Communists had not been expelled in 1933, he argues, the Nazis would not have come to power. Similarly, Mr. Humphreys, of the Proportional Representation Society of Great Britain, says that the Franco forces revolted in Spain because the majority system gave the moderate Republican administration more than the proportionate majority to which mathematical justice entitled it.

Mr. Hallett and Mr. Humphreys want all political leaders to reconcile their peculiarities by legislative deliberation; Mr. Hermens says deliberation is impossible among men whose aims are irreconcilable and who are not individually responsible to electoral districts which tend to be cross sections of the nation as a whole.

Mr. Hermens concentrates his attention so greatly on one aspect of the relation between electorate and legislature that he only occasionally buttresses his position by showing its connection with related problems. He might well have emphasized more strongly that the electorate should not only choose a legislature by majority vote, but demand that it accept responsibility for its decisions; that the legislature not only should be chosen by a system involving responsibility to the whole nation, but ought to adopt procedures enabling it to act as a whole rather than through blocs or combinations of blocs.

But his particular subject is broad enough for a single book. On it, Mr. Hermens' research is thorough, his historical interpretation realistic, and his general argument philosophically sound. His study leaves the burden of proof distinctly on those who propose to set up an electoral system by which the voters will be impelled to affirm their conflicting philosophies at the cost of their fundamental purpose—the maintenance of responsible government.

DON K. PRICE.

Public Administration Clearing House.

Public Utilities and the National Power Policies. BY JAMES C. BONBRIGHT. (New York: Columbia University Press. 1940. Pp. 82. $1.25.)

The author and Columbia University have performed a distinct service in providing a "convenient synthesis" of the national policies (Roosevelt administration policies) relative to electric public utilities. The monograph consists of the lectures delivered by the author at the 1940 summer session of Columbia University.

That the monograph was published early in the 1940 presidential campaign, in which it was predicted that the national power policy would be a major campaign issue between the Democratic and Republican candidates, fortunately did not detract from the author's traditional fair, clear, and scholarly approach to the governmental aspects of the electric power question. The growing prominence of the foreign policy of the Administration, which dominated the closing period of the campaign, in no way invalidated the author's thesis that the "set of problems raised by the conflict between private profits and social control in regulated industry is one of the major political issues of the day." The author gives President Roosevelt credit for clarifying the issue relative to electric power and raising it to the "rank of a major political issue."

After stating the several historical reasons for governmental regulation of electric power, the author emphasizes the "natural monopoly" characteristic of the electric power industry. In the absence of adequate competition, "which was proved hopeless by sad experience," and in the presence of the natural-monopoly feature of public utilities, "public opinion . . . demanded either regulation or else outright public ownership as a protection against the abuses of a private monopoly" (p. 7).

Under title of "fair value doctrine" of rate regulation, the author points out the conflict between "two different standards of reasonableness": the "cost plus" standard and the "competitive" standard. A qualified version of the "cost plus" standard has been the one most usually adopted by commissions, while the present Roosevelt or national power policy favors the "competitive," or "public yardstick," standard.

The failure of the "cost plus" standard has grown out of the "court-made 'law of the land,' " which has led commissions, often after long litigation, "to decide rate cases by reference to an almost meaningless engineering appraisal of the physical properties." This attitude of the courts, according to the author, "has gone a long way toward bringing regulated private ownership into disrepute" (p. 20).

The author weights the strength and weakness of holding companies, with their tremendous size, exorbitant prices paid for properties, pyramided holding-company debt, and unwarranted profits to their service companies. He points out that "the investors have been the most immediate victims" of holding company activities.

Under the chapter on "Power Policies of the Roosevelt Administration," the author traces the power policies of Roosevelt as governor of New York, where "he had met the utility problem head-on," and as candidate for president in 1932, when he announced "a new 'national power policy' as a part of his political platform"—which policy to this day has "taken the form of a consistent and coherent program." The program includes the attempt to fortify and make more efficient rate regulation of private utilities and to combine such regulation with some form of public ownership, on the assumption that "under proper conditions private and public plants can co-exist in tolerable harmony and in wholesome rivalry" (p. 30). The author concisely presents the essentials of the program under the headings: (1) measures designed to make regulation more effective; (2) the public power program; and (3) rural electrification.

Under the above, the effect of the Federal Power Act of 1935, giving partial control over interstate business of electric utilities, is explained. With regard to the court-made "fair value rule," the author ventures to predict that the Court in the future will take a "flexible position," leaving freedom for experiments with different types of rate control (p. 34).

The public power program intended to create a "public yardstick" system has recently been influenced by the apparent necessity "to plan public works for relief of unemployment." The Administration's program presents two aspects: (1) the public water-power projects and (2) federal support of publicly owned, local distribution systems.

After pointing out the reasons for the action of the government in the field of rural electrification, with emphasis upon the social gains and the probability of "resort to outright subsidies of formidable size," the author leaves the question open with the statement that "few problems of democracy call for a rarer combination of social vision and hardheadedness than does the problem of subsidized services" (p. 55).

In conclusion, the author points out that he limited himself to two things: "first, to indicate why private ownership under state regulation came into such disrepute . . . and secondly, to review the efforts of the present Federal Administration to meet the situation, partly by fortifying regulation and partly by encouraging experiments in public ownership." He warns his readers that his treatment of the subject should not be taken as an appraisal, favorable or unfavorable, of the Roosevelt power program in its many details and in its methods of execution. Such an appraisal, which no one man would be competent to make, must await the test of riper experience" (p. 56).

The author has no fear that public ownership in the utility field will become "an entering wedge for socialism." "The history of public ownership, not only in this country but abroad, shows no marked tendency on its part to spread, like an infection, into the non-utility field" (p. 58).

An appendix of twelve pages presents a reprint of an article by Dr. Bonbright, published in the *Yale Review* in 1938, in which he favors continuation of the trend toward public ownership, "while giving adequate assurance that legitimate investments in private power enterprises will be safeguarded against destructive public competition."

This study should encourage other social scientists to meet current social problems "head-on."

ORREN C. HORMELL.

Bowdoin College.

Employee Training in the Public Service; A Report Submitted to the Civil Service Assembly of the United States and Canada by the Committee on Employee Training in the Public Service, MILTON HALL, CHAIRMAN. (Chicago: Civil Service Assembly of the United States and Canada. 1941. Pp. xvi, 172.)

Management of personnel has taken an added significance as the affairs of government have increased in magnitude and importance. The Civil Service Assembly has always taken cognizance of, and aided in, the rapid extension and improvement of merit systems in all levels of government. Our extensive defense preparations, with their impact upon all governments, draw added attention and renewed interest to the problems of recruitment, training, salary standards, and general management of public service personnel everywhere.

This volume is one of a series of about ten reports of studies being undertaken by the executive council of the Assembly. The plan is to bring together for the first time a set of authoritative and forward-looking volumes dealing with the major phases of public personnel administration. An ambitious group research enterprise has been set on foot consisting of hundreds of outstanding personnel officials, general administrators, technical and research workers, educators, and representatives of civic, professional, and employee groups. Other volumes to appear are on positive recruitment, the probationary period, classified pay plans, service rating plans, placement, public relations, and several other topics.

Employee training as defined by the study committee is "the process of aiding employees to gain effectiveness in their present or future work through the development of appropriate habits of thought and action, skills, knowledge, and attitudes." To the educator, much of this volume is merely compilation and restatement. However, this is not to say that for those interested in public employee training the evaluation does not present a large amount of sound advice to stimulate and assist in the training process. Emphasis is placed correctly on the part management has to plan and play in aiding employees to gain effectiveness. The committee recognizes correctly that every person in charge of the work of others, from the chief executive to the first-line supervisor, has responsibilities for training those under him. The need for continuous training is all too apparent in every government.

The immediate objectives of any training program, either within or without the government, must be the same, wherever pursued. Employees must maintain or increase their effectiveness in their present positions, must prepare themselves for promotion, must prepare for positions which are more secure than those which they hold, and must develop coördination, morale, and other elements of organization fitness. Naturally, the only justification for the expenditure of time and money of either the government or the employee is a return to the government service of either a financial saving or an improved service to the public or both. Group and individual forms of instruction and devices for self-instruction are examined and explained. The report does not emphasize or recommend any particular form of instruction, but rather leans to the in-service system of training as presenting a knowledge of the techniques of departmental problems superior to that which could be obtained at formalized educational institutions or through tutoring, short courses, or conferences. The use of a form of sabbatical leave to take advantage of the opportunities of university specialization has much in its favor, has proved extremely successful, and has only one serious drawback—not enough governmental personnel can be taken care of at any one time.

Personnel managers, executives, supervisors, and employees—public and private—should welcome this volume and the others to come as valuable additions to the too scanty literature on specific phases of personnel management, and the Civil Service Assembly is to be congratulated on the launching and early completion of so valuable an enterprise.

EDWIN A. COTTRELL.

Stanford University.

International Executive Agreements. BY WALLACE MCCLURE. (New York: Columbia University Press. 1941. Pp. 449. $4.75.)

America is aware of the fact that the President has the power to conclude executive agreements, but most readers will doubtless be surprised by the statement that by the time this country was 150 years old more than 1,200 such pacts had been concluded with other countries. Dr. McClure points out that during the same period only 800 treaties were put into force, and that during the last fifty years 524 treaties were made effective as compared with 917 executive agreements. This suggests that a more extensive use may be made of executive agreements in the future.

Dr. McClure's very able work is divided into three parts and contains an introduction and conclusion. In the introduction, the author contends, first, that the two-thirds rule governing the Senate's approval of treaties is undemocratic and that during a critical period it may be injurious to the welfare of the country; and, second, that executive agreements may relate to any subject that may be dealt with by treaty.

Part I is devoted to a description of executive agreements consummated from 1776 to the present. The agreements thus presented are as varied in type and as numerous as space allowed. Part II reveals that the power to make executive agreements is based on constitutional usage; while Part III deals with the constitutional powers of the President and Congress.

Dr. McClure maintains that (1) "in correct theory and on the face of the Constitution as reasonably interpreted, the President has unlimited authority, regardless of subject-matter, to enter into executive agreements"; (2) with respect to executive agreements, as in the case of treaties, the President may execute commitments which deal only with international relations and he may not violate the substantive provisions of the Constitution; (3) certain executive agreements, like various treaties, cannot be carried out except with congressional action; (4) as an element of a democracy, Congress has the final power in case of conflict between a legislative and an executive act; and (5) with the support of Congress, the President can accomplish through executive agreement anything that he can accomplish by treaty.

In the final chapter the author concludes, among other things, that it is necessary to keep the conduct of international relations flexible and legally concentrated. The President, he contends, as a representative of all the people, is a logical organ for that concentration; and while congressional participation in the making of executive agreements during normal times should be insisted upon, during a critical period a curtailed power of the President is not desirable.

The book is timely and well written: and the footnotes reveal extensive research.

William Hays Simpson.

Duke University.

Versailles Twenty Years After. By Paul Birdsall. (New York: Reynal and Hitchcock. 1941. Pp. xiii, 350. $3.00.)

In spite of its title, this volume is not primarily a study of the fortunes of the Versailles Treaty in the last twenty years. It is rather an analysis of its making, based on recently published materials and unpublished sources. Appraisals of the effect of certain provisions of the treaty on later developments in Europe are incidental to narratives of the controversies at the Peace Conference on crucial points of the peace settlement: colonies, Japanese claims, League sanctions, disarmament, German borders in the East and in the West, reparations, and Italian claims. The book is an important contribution to the history of the Peace Conference.

Attention is focussed on the fundamental clash between the disinterested idealism of Wilson and the frankly selfish claims of the non-American powers—British dominions no less than Japan or Italy—and on the rôle played by Colonel House. The causes of misunderstandings and disagreements are in part traced to the traditional divergence between the Anglo-American and the Continental attitudes toward the problem of national security. France, outnumbered and ever threatened on the East, found little assurance of security in the program of voluntary international co-operation sponsored by the insular powers. Universal military service, favored by France and long accepted throughout the Continent as the most democratic as well as the most effective form of recruitment, was regarded with abhorrence by the Anglo-Saxons, who believed themselves secure behind their water barriers. The American nation, led by its lofty-minded President, overlooked the probability of the war having been just another round in an ineluctable and age-old struggle for survival and power. With the inexperience and impatience of youth, it clamored for a millennium of peace, yet in the end refused to bear its share of the burden of maintaining that millennium. The failure of the Anglo-American philosophy to stand the test of reality is now evident. Like France of a generation ago, America today puts her trust in pushing forward her military frontiers and in conscripting her man-power. The futility of covenants not backed by real and unified power must be clear to all.

Yet it was not a bad peace. Probably not since the Congress of Vienna had so much effort been made to work out a just European settlement. Apart from the absurd reparations provisions, which were hardly taken seriously even by those who drafted them, and which were never executed, very little in the peace imposed on Germany was iniquitous or contrary to the pre-Armistice understanding. The author shows how time and again Wilson leaned backward to be fair to Germany, even in the face of advices of his own experts, as on the questions of the Polish boundaries and the Saar. The much-maligned Polish "corridor," for instance, was justified not only as a Polish exit to the sea, but also on indisputable ethnographical grounds.

The interpretation of the conflicts of claims and attitudes at Versailles which forms the kernel of the book is masterly. It is regrettable that the title of the volume seems to stress the somewhat less impressive reflections of the author on the later fortunes of the peace treaty. These reflections are not supported by any concrete examination of European history since 1920, and do not always rise above the commonplace. For instance, the contention that Germany could have been really appeased by timely economic concessions before Hitler took power is merely a repetition of a widespread but unsubstantiated notion. Some confusion between paper guarantees and real guarantees seems to be responsible for the author's insistence that the objective of French security was achieved at Versailles through provisions for German disarmament and the demilitarization of the Rhineland coupled with the promise of an Anglo-American military guarantee, and that only the failure of France and Britain to oppose by force the remilitarization of the Rhineland in 1936 impaired this security.

The author seems to subscribe to the theory that American "defection" from the system of collective "security," which he largely identifies with the refusal of the United States to ratify the peace treaty, was in part responsible for the failure of that system. But would the mere adherence of the United States to the Covenant have guaranteed continuous readiness to implement its safeguards? In the true spirit of the Versailles era, the author deals with this problem only in terms of vague generalities concerning the "authority" and the "impartial influence" of the United States. Apologists for England and France assert without an iota of proof that American non-participation was responsible for the failure of the League to impose effective sanctions and stop Italy in 1935. Could the United States as a League member have done more to stop Japan in 1931–32 than it actually did, in the face of British opposition?

Although by no means blind to the weaknesses of any system of world order organized on the principle of a standing diplomatic conference of sovereign states, such as the League of Nations, the author considers as impossible the adhesion of the United States to any combination, such as Union Now, which would mean the scrapping of national sovereignty. He is probably right. But he fails to note that the only alternative to real world order is shrewd, selfish, "all-out" participation in the international struggle for survival with the aim of maintaining a balance of power favorable to American interests. "Solutions" of the Versailles type provide no substantial security for anyone and put a premium on international faithlessness and violence by creating illusions in the minds of honest men and paralyzing their will to action. It is only in this sense that Hitler and his successes can be called products of Versailles.

OLIVER J. LISSITZYN.

Council on Foreign Relations.

Prepare for Peace. BY HENRY M. WRISTON. (New York: Harper and Brothers. 1941. Pp. 275. $2.75.)

The continually increasing number of books and essays dealing with the peace which is to follow the present war seem mostly to be concerned with four main issues: (1) the time and conditions under which the war shall be ended and peace declared; (2) the specific terms of the peace; (3) the problems of the period of post-war reconstruction; and (4) the machinery and techniques for the solution of world problems and the creation of world organization. Mr. Wriston's concern is primarily with a generally neglected aspect, although he discusses at length the four issues just noted. He urges that preparing for peace calls for the same kind of strategy and planning as does a campaign for war. The war is a means deliberately adopted to make possible the establishment of an acceptable kind of peace, and the present war must be looked upon as such a means to a desired end. Will this war be won, he asks, and the peace again be lost, as in 1920? To win the peace this time requires the careful organization *now* of expert opinion, the anticipation *now* of the problems of negotiation and diplomacy which must be faced at the peace conference, the laying *now* of alternative courses of action in the face of predictable alternative developments at the conference. The campaign to win the peace conference should now be under way. It should be worked out in as great detail as possible and should go beyond vague statements of peace aims. Not a blueprint for peace, but *many* alternative formulations of the peace must be conceived, so that all possible circumstances can be met. He approves in principle the steps already taken by the State Department, but points to their inadequacy in terms of scope, and in terms of the time and attention given by a staff already heavily burdened by the duties produced by the world crisis.

Mr. Wriston has described in extremely interesting and realistic fashion the highly intricate process of making peace. The volume reflects a rich background of understanding concerning the operations of international conferences and the influence of individual and national psychology. It is gratifying to see the publisher's awareness of the importance of this question, reflected in the issue of Mr. Wriston's manuscript in an attractive popular edition. In our democracy, public opinion still weighs heavily in the balance when governmental decisions are made. The more the requirements for creating a lasting peace are understood, the greater the prospects for its final achievement. There cannot be too many books of this kind.

WALTER H. C. LAVES.

University of Chicago.

Hands Off: A History of the Monroe Doctrine. BY DEXTER PERKINS (Boston: Little, Brown and Company. 1941. Pp. xiii, 455. $3.50.)

The United States as a Factor in World History. BY THEODORE CLARKE SMITH (New York: Henry Holt and Company. 1941. Pp. viii, 142. $1.00.)

Professor Dexter Perkins is well known as one of the leading authorities on the Monroe Doctrine through the previous publication of three monographs dealing with different periods of its history. His latest volume is, in a sense, a synthesis of the earlier volumes and, embodying a general survey of the whole history, will have a greater appeal for the general reader, or, at least, for the more thoughtful and sober-minded section of the general reading public. The striking title and the entertaining style, as well as the relegation of all footnotes and bibliographical data to the appendices, while making the book more attractive for the general reader, do not conceal its scholarly qualities.

The timeliness of the book is emphasized by recent speculations as to the ability of the United States to maintain the Doctrine in the face of the growing menace of Nazi penetration in South America, especially below the bulge of Brazil, and by the growing realization of the American people of the extent to which its maintenance has been dependent on the British fleet. The book traces the history of the "principles of 1823," as the author prefers to call the Doctrine, from the earliest beginnings of the idea through the summer of 1940, including the Havana Conference of that date and the congressional joint resolution affirming the no-transfer rule. The most important chapters for the political scientist are those dealing with "The Doctrine and the League," "The Doctrine and the Good Neighbor" and the last chapter discussing Monroeism in its broad outlines, past, present, and future.

The author has examined with great care all important sources of information, both primary and secondary, and has worked not only in this country but in the principal archives of Europe. The book is not exhaustive in working out in fullest detail all possible phases of the subject, but as a general survey it covers adequately all the essentials. The ramifications of the principles of 1823 are so broad that an adequate treatment involves the rewriting of large portions of American history, selecting those events, tendencies, and utterances of statesmen which have some bearing on the development of Monroe's declaration. Professor Perkins has performed the work of selection with meticulous care and with conspicuous success.

In considering the fight in the Senate over the entrance of the United States into the League of Nations, the author brings out little that is new. Although he demonstrates that there is no necessary incompatibility between the principles of 1823 and the internationalist point of view as embodied in the Covenant of the League, he nevertheless shows that the Doctrine was used as one of the rallying cries by those who were opposed to the League.

The author raises, without definitely answering, the important question as to the applicability of the Doctrine to the ideological penetration of South America by the Nazis. He does not discuss specifically the effect of the radio and the bombing plane upon the Doctrine. The reader gathers, however, that he would consider the Doctrine, even though originally predicated upon the existence of the two spheres, to be sufficiently flexible to have continuing validity in a shrinking world. On the whole, and within his space limits, Professor Perkins has produced as nearly definitive a study as seems feasible in the case of a subject whose future development may be even more important than that of the past.

In his slim volume, Professor Smith has essayed, with considerable success, the difficult task of sketching, within very small compass, the entire history of the United States with special reference to its relations to world history.

JOHN M. MATHEWS.

University of Illinois.

Legal Problems in the Far Eastern Conflict. By Quincy Wright, H. Lauterpacht, Edwin M. Borchard, and Phoebe Morrison. (New York: Institute of Pacific Relations. 1941. Pp. xi, 211. $2.00.)

To the specialist on the Far East and to the international lawyer, this volume will be valuable and stimulating. It really consists of two parts: in the first, Professor Quincy Wright considers the legal aspects of nearly every important situation and issue in the Far East; in the second, Professors Lauterpacht, Wright, and Borchard, and a Round Table of the Virginia Beach Conference of the Institute of Pacific Relations, present conflicting views on the Non-Recognition Doctrine.

The topics discussed by Professor Wright include: the differences between *de jure* and *de facto* situations in the Far East; the status of Far Eastern territories; territorial rights within this region, as represented by extraterritoriality, leased territories, and treaty-port concessions and settlements; and the legal relations involved in the Far Eastern conflict. The value of this part of the book lies in the keenness of the analysis of the legal issues involved, the completeness of the documentation, and the clarity of presentation. With most of the legal views advanced, critics will be in complete agreement. With a few, however, there will be a measure of dissent, such as the contention that a declaration of war by a state which starts hostilities in violation of the Pact of Paris does not create a legal state of war (p. 93).

As to the principle of non-recognition, the differing points of view are ably presented. Professor Lauterpacht strongly approves it. He bases his argument on the well-known legal maxim *ex injuria jus non oritur*, and states: "The results of an illegal act [such as Japan's seizure of Manchuria] are a legal nullity; they are legally non-existent. The wrongdoer acquires no right under it" (p. 146). A declaration of non-recognition, he says, points out the existence of the illegality, and therefore helps to maintain the law.

Professor Borchard, on the other hand, disapproves the doctrine. He contends that for a state to attempt to judge whether a change, territorial or political, effected by another state is legal or illegal is generally impractical and often dangerous; that non-recognition "is an act of hostility"; and that, in actual practice, the attempt to apply the principle has not developed peaceful relations among nations, but has tended to create international friction.

The Virginia Beach Round Table gave a qualified and temporary approval of non-recognition: "For the time being, the majority considered it desirable . . . to support the doctrine, in the hope that the transition through which the world is passing can be made to yield a more effective international organization within which the non-recognition of *ultra vires* acts will be an essential element" (p. 184).

Professor Wright strongly supports non-recognition. He differs, however, with Professor Lauterpacht on a number of points, especially in maintaining that the Pact of Paris places a legal obligation on the signatories to refuse to recognize territorial changes brought about in violation of the pact. In the chapter entitled "Conclusion," he outlines his own views and gives a critical analysis of those of Professor Borchard.

A student either of the Far East or of American foreign policy will do well to read in full this detailed discussion of the highly controversial principle of non-recognition.

GEORGE H. BLAKESLEE.

Clark University.

War and Diplomacy in Eastern Asia. BY CLAUDE A. BUSS. (New York: The Macmillan Company. 1941. Pp. xi, 570. $5.00.)

The South Seas in the Modern World. BY FELIX M. KEESING. (New York: The John Day Company. 1941. Pp. xv, 391. $3.50.)

Professor Buss has written "an analysis of the contemporary political situation in Eastern Asia" in two approximately equal parts, the former dealing with the interests and policies of Japan and China, the latter with the interests and policies of Western states. He brings to his task not only academic study and travel but a period of experience in the American foreign service in China. Professor Keesing, after many earlier studies, which have established his authority in the field of his survey, "attempts to define comprehensively the political, strategic, and economic rôle . . . , and especially the modern experience and problems," of the peoples of Polynesia, Melanesia, and Micronesia. Both volumes contribute worthily to available materials—that of Professor Buss by a crisp analysis and well-balanced interpretation of the complex factors involved in the past decade of world politics in the Far East, that of Professor Keesing by assembling, in a style at once scholarly and readable, scattered data upon a little-known area.

Part I of *War and Diplomacy in Eastern Asia* contains six chapters, the first of which sets off the recovery efforts that began during the first World War against the decline of Chinese power under Western pressure for territorial and economic concessions during the nineteenth century. Subsequently there is treatment of the program and problems of Chinese nationalism, of Sino-Japanese relations culminating in war and a "New Order," of Japan's claims to a preferred position against Western interests and the effects of the war upon those interests, of the attempt and failure to apply the collective security system, and of the interaction of the European and Far Eastern wars. Part II deals in sequence with the interests and policies of the United Kingdom, France, Germany, the minor

European powers, the Soviet Union, and the United States. The volume is indexed, excellently printed and bound, and contains maps of China and of Southeastern Asia.

Dr. Buss writes in journalistic style, using a minimum of footnotes and numerous quotations, many of them from unnamed authors. Although bibliographical notes—on authors rather than on their writings—and a useful bibliography are appended, the book's utility as a text is somewhat limited by the scarcity of precise references. Students will, however, enjoy reading it and can do so with assurance, since the author amply demonstrates his command of the facts. For the lay reader, the reviewer knows of no book on this subject which is at once so comprehensive and so reliable. However, it takes for granted a general knowledge of historical and recent developments, which the author seeks to interpret rather than to record. His interpretation is impartial and internationalist in its attitude toward the motives and interests of all the states involved. He does not overlook the faults of the Chinese nor the needs of the Japanese. "No nation," he writes, "is completely guiltless, none is wholly at fault." He refers without smugness to the imperialist acts of Western states: "The only hope of peace, with mutual prosperity, lies in the wholesale abandonment of past misdeeds, and in the substitution of a sense of international obligation for false concepts of national honor."

The South Seas in the Modern World, which was issued under the auspices of the Institute of Pacific Relations and the University of Hawaii, is in the main a sociological survey, in which brief attention is given to governmental organization and to the Island groups as pawns in world politics. The text is a mine of information upon racial origins, development, and inter-action, economic resources and production, land policies, types of occupation, education, health, and religions. In sixty pages of appendices appear supplementary statistical data which are especially full regarding agricultural and mineral production and external trade. A lengthy bibliography, an index, and three maps drawn by the author round out this remarkable undertaking.

Professor Keesing remarks that "in a real sense the Western peoples are just a generation or two ahead of such groups in reshaping traditional tools, institutions, beliefs, and sentiments in the light of the machine age and modern science. . . . " He points to the influence of employment outside the native villages, of the white trader and the missionary, of the growth of towns, of Western administration, etc., upon native institutions, which are, however, resistant to arbitrary processes of change, and should not be hurried or held back but permitted to evolve according to native predilections. The difficulty of imposing Occidental principles of land tenure and taxation, of industry and business, of government and law, as discussed by the author, demonstrates that *difference* rather than *immaturity* is the clue to readjustment. How medical, educational, and religious services have dealt with native ideas, and the requirement of more adequate attention to such services, as well as the most serious concern for the economic disorganization accompanying the increase of population and the loss of foreign markets, are very thoughtfully presented. Dr. Keesing has contributed notably to the treatment of the task which he lays upon the statesmanship of the next decade: to regard the islands "as an important charge upon its attention and constructive effort. . . ."

HAROLD S. QUIGLEY.

University of Minnesota.

The Dutch East Indies; Its Government, Problems, and Politics. Revised edition. BY AMRY VANDENBOSCH. (Berkeley: University of California Press. 1941. Pp. xii, 446. $4.00.)

This very valuable account of the Dutch empire is a revised edition of the book which Professor Vandenbosch published about eight years ago. Considerable changes have occurred since then, both in the internal situation and in the international relations of the East Indies, and a detailed account of them has been embodied in the new edition. There is a concise but at the same time accurate and comprehensive account of every phase of the colonial problem. Professor Vandenbosch is exceedingly balanced and impartial: he presents a fair and objective picture of both the successes and the failures of Dutch colonial rule.

The first three chapters deal with the racial, social, and economic background. They are followed by an account of the evolution of Dutch colonial policy, from the exploitation of the East India Company and the culture system to the trusteeship of the present century. The next seven chapters describe the structure of government, the native states, and the civil service. The emphasis is placed upon the existing situation, but historical passages are of great assistance to readers unfamiliar with Dutch institutions. A very puzzling feature to a student of American or British colonial administration is that the Council of the East Indies, the body of high officials specifically created to advise the governor-general, does not include the department heads. The latter are responsible for carrying out and often for originating policy; and it is not surprising that their inability to state their case in person to the head of the government leads to a "bewildering lack of integration" in the administration. The salient impression left by the chapter on Indonesian nationalism is that of a multiplicity of small parties which are incapable of combining.

The chapter on the judiciary gives a good account of the policy of studying and preserving Indonesian customary law. This has been one of the wisest measures which the Dutch have adopted. There follow careful accounts of problems and policies in the fields of education, health, rural debt, land, and labor. The chapter on government finance brings out a feature too often ignored in books on colonial administration, i.e., the problem of how to pay for the exceedingly expensive social services which liberal opinion insists must be established in the tropics. The stumbling block is that the native taxpayers have no money to pay for them since the vast majority live by subsistence agriculture. So the colonial government is confronted by the dilemma of utterly inadequate social services where the need is clamant, or else of creating the taxable capacity by encouraging Western capital to develop the natural resources of the country with all the problems which this entails. Professor Vandenbosch points out that the extensive agricultural and mining interests are as much the result of Dutch humanitarianism as of the desire for profit. Altogether, this is easily the best account of the Dutch Empire in the English language.

LENNOX A. MILLS.

University of Minnesota.

Sea Power in the Machine Age. BY BERNARD BRODIE. (Princeton: Princeton University Press. 1941. Pp. viii, 451. $3.75.)

A selection of the Scientific Book Club, this work details with admirable skill and honest craftsmanship the five great naval developments that bridge and span between Trafalgar and today's naval battles. The first is the steam warship which, by canceling out the influence of the wind, changed the whole complexion of sea power and introduced the all-important fuel problem into world political calculations. The second, the iron-hulled warship, resulting from the competition between armor and great ordnance, arrested the threat of extinction to the large warship of the time, and assured its renewed growth in size and strength to the great "capital ship" of the modern navy. But the old race between guns and armor kept pace with the changes in naval craft. This conflict is the third great development described by Dr. Brodie, and is one of the most interesting features of the book. Armor became thicker and more rugged as ordnance challenged it with more powerful guns, armor-piercing projectiles, and associated mechanisms. Extraordinary results followed. Large vessels cost more, took longer to build, were limited in number, and became highly specialized. Personnel training changed. Naval battles took place at greater range and with more chances of quick decision.

Significantly, too, the competition stimulated the search for underwater attack. At the same time, armor and ordnance had to face the serious challenge of aircraft. With these two remaining revolutionary developments, naval warfare entered new dimensions. Easier to produce and relatively low in costs, the torpedo, mine, and submarine were conceived as defenses against superior sea power. Their effectiveness lies in concealment and in their ability to strike at the more vulnerable parts of the surface vessel.

Also relying upon concealment, freedom to seek out and surprise vulnerable targets, and swift attack in numbers, aircraft not only challenges sea power in coastal waters and near its own bases, but makes possible, at least against countries situated like Britain, violent attack on land objectives over waters commanded by the opposing fleet.

In drawing general conclusions from all these technical changes, the author is at his best in the field of naval tactics and strategy, and weakest in the larger field of world politics. Unless technical developments are also assessed in terms of the larger human struggle they serve, it avails little to show that sea power is rapidly specializing within three dimensions, that enhanced contact at sea keeps fleets closer to home, that long-range blockade supersedes the old close blockade, and that new weapons have not yet outmoded the capital ship nor seriously destroyed the favored balance shore defenses enjoy over naval assault. Here and there, Dr. Brodie draws some of the obvious conclusions, such as the intensified struggle for fuel and raw materials, the restriction of naval theaters of action to regional areas which a strong industrial and military power may dominate, and the crushing burden of increasing naval budgets. But he does not go much beyond them. Perhaps the trouble lies in the fact that the technics of sea power alone, however revolutionary, are after all insignificant in the larger pattern of human affairs. The author himself observes: " . . . on the sea itself much is unaltered. . . . Sail gives way to steam and timber walls to iron, vessels of war take cover in the depths of the sea and spread their wings far above the crests of the waves, but naval war remains much the same in its purposes and in its accomplishments." This is an important conclusion and, if true, a real contribution to scholarship; for it invites students to examine the more fundamental springs of technology rather than its collateral manifestations, in order to assess its influence upon the traditional pattern of world politics.

GEORGE H. E. SMITH.

Yale University.

The Armed Forces of the Pacific. BY CAPTAIN W. D. PULESTON. (New Haven: Yale University Press. 1941. Pp. xiv, 273. $2.75.)

The darkening shadow of war over the Pacific during recent months highlights this timely volume which, as its subtitle states, is "a comparison of the military and naval power of the United States and Japan." Captain Puleston should be well qualified to speak on this subject after a long and distinguished naval career which included the course at the Naval War College, service on the Asiatic Station, and a tour of duty as Director of Naval Intelligence. He is better known in civilian circles for his comprehensive and readable biography of Mahan published in 1939.

Captain Puleston's latest book opens with a brief sketch of "the rise of modern Japan." This is followed by a survey of "Japanese military organization," a chapter which contains much of importance to students of government and administration. The same can be said of the ensuing chapter on "the American high command," in which the author describes our own military structure, the hierarchy of command, Army and Navy administration, war planning, the coördination of the land, sea, and air forces, etc. In a chapter on military geography, the author comes to the generally accepted conclusion among experts, that "the position of the United States in the Far East" is today one of great potential strength; that of Japan, one of inherent weakness. From descriptive and statistical comparisons, he reaches a similar conclusion as to the actual relative strength and efficiency of the Japanese and American navies, a conclusion with which some authorities, though not this reviewer, would probably take issue. In his sections on strategy and tactics, the author tends on the whole to follow conventional paths. Rather too little, in the judgment of the reviewer, is said about some of the newer weapons and formations, such as current and prospective developments in long-range bombing, the potentialities of carrier-based torpedo planes, the so-called carrier-striking-group, etc. These omissions are serious, the more so because it may be these newer weapons, rather than massed fleets, which will strike the decisive blows in case of armed conflict in the Pacific.

In conclusion, the author urges a more aggressive foreign policy which will enable the United States to achieve what the author forcefully sets forth as the manifest destiny of this country to become the world's leading power in the years ahead. Admiral H. E. Yarnell contributes a thoughtful, well-written Foreword. The book has no documentation or bibliography, but there is an adequate index which enhances its utility for reference purposes. Although obviously written for the general reader, the volume contains much that will be useful for the special student of government, administration, military geography, and international politics. Captain Puleston does well what he set out to do, and is to be congratulated for thus contributing a timely addition to the rapidly growing literature of power politics.

HAROLD H. SPROUT.

Princeton University.

BRIEFER NOTICES

AMERICAN GOVERNMENT AND POLITICS

In his thought-provoking volume, *We Have a Future* (Princeton University Press, pp. viii, 236, $2.50), Norman Thomas writes upon our failure as a nation to take advantage of our resources and our abilities, of our losses from not making proper use of our favored position, and of our future—a future that offers much if we profit from mistakes and plan for the future along the avenues outlined in his concluding chapters. Asserting that the Peter Pan epoch of American life is at an end, that capitalism has failed, and that Americans refuse to face realities, the author outlines the chief provisions of his plan for internal improvement within the United States. He concludes: "We must produce more, share it more equitably, and in the process add to, not subtract from, the dignity of the individual." With respect to our form of government, the author finds that the Roosevelt Supreme Court has made drastic reform of that tribunal unnecessary. He favors the direct popular election of the president and a modification of our party system such that third parties might develop. In foreign affairs, Mr. Thomas opposes the entrance of the United States into the war. Of particular note is the statement, written in the spring of 1941, that an alliance between China, the U.S.S.R., Great Britain, and the United States is "politically unthinkable." Few readers will disagree with the author's fear of Russian communism, but many might differ as to the relative danger to the United States from Hitler and Stalin. As for Mr. Thomas, he "can imagine no events which will change my own judgment on the war, and our duty toward it." The volume is a clear and vivid account of the author's views on the immediate past and on the future of the United States.—ROBERT S. RANKIN.

In his *The Deflation of American Ideals; An Ethical Guide for New Dealers* (American Council on Public Affairs, pp. 184, cloth $2.50, paper $2.00), Edgar Kemler, a young editorial assistant on *The Nation* in 1937, research assistant for the Democratic National Committee in 1940, and Littauer fellow at Harvard in 1940–41, reviews the history of American progressives and concludes that, until quite recently, they have seriously impaired the effectiveness of their efforts by mixing Christian and Puritan ideas with their political programs. He says, for example, that the old progressives "were as much concerned with saloons and houses of ill-fame as they were with traction franchises" (p. 27). The author maintains that the depression forced a "Flight of the Angels," a descent to "Political Animalism." He explains that this leaves sin in the exclusive jurisdiction of the churches and frees public men to deal with the hard facts of economics. He notes with satisfaction that President Wilson laid aside some of his concern about the evils of the party organization in order to get his measures through Congress, and he praises the New Dealers for being the first progressives to rid themselves of the last vestige of political prudery and beat the conservatives at their own game. "An economic despotism had grown up in the shelter of this free country," he writes. "It was an almost invulnerable stronghold, entrenched behind barricades of newspapers, political hirelings without number, and vast resources for confusing and frustrating the public. What we needed was a progressive army with comparable political power, with full equipment for defense and counter-attack. If they had holding companies, we must have trade unions. If they suppressed some of our civil liberties, we must suppress some of theirs. If they had their political hirelings in the Republican party, we must secure ours in the Democratic party" (p. 112). This sprightly volume of stark realism will probably meet with considerable favor among the more intellectual supporters of the New Deal Administration. At the same time, it may be quoted in the hinterlands as proof of the amorality of the New Dealers. Although students of American politics and political theory may object to some of the author's generalizations and question his low estimate of the weight of moral forces in public affairs, they will read his stimulating volume with profit.—CLAUDIUS O. JOHNSON.

The latest recommended manual on official etiquette, in which all citizens should be potentially interested, is *Public Relations of Public Personnel Agencies; A Report to the Civil Service Assembly* (Civil Service Assembly of the United States and Canada, pp. xviii, 259). Public relations are defined as those that "have to do with the development and maintenance by any legitimate means of favorable attitudes on the part of the people with whom any agency comes into contact." The exclusion of the base forms of propaganda is the contribution of this definition. Through the prescribed activities of the agency—self-criticism, the exploration and assessment of the attitudes of the publics, and the making of the necessary adjustments—runs a known theme in special variation: whenever a personnel agency allows information and understanding to flow both ways, from agency to publics and from publics to agency, the result is a contented and efficient democratic civil service instead of an arbitrary bureaucracy. The manual has accepted some implied theory of why man acts as he does and has approved the psychological formulas for eliciting public attitudes. Its chief contribution, however, is the assessment of practices, private and public, and the recommendation of the best to be followed by the personnel agencies. It appears, too, that an ideal touch has been added for those who can use it. The body of the manual is divided into three parts. The first is an excellent analysis of the agency's publics, such as the three departments of government, interest groups and the press, and their attitudes; the second deals with the usual media—reports, newspapers, radio, movies and personal contacts; and the third is a documentation of methods actually used by certain agencies. One is impressed by the possibility of fatal blunders if the manual's detailed directions are not carried out. The manual's rules of etiquette need not frighten the official any more than similar prescriptions do the private individual in his social activities. It is to be hoped that the Civil Service Assembly will adopt this textbook as a working basis for all public personnel agencies. The report concludes in metaphorical terms with a plea for a two-way street.—J. P. COMER.

Those who think of N.Y.A. as aid to college administrators in keeping up the level of tuition income, or of N.Y.A. and C.C.C. as being outmoded by current defense production, will find food for thought in *Youth Work Programs; Problems and Policies* (American Council on Education, pp. vii, 195, $1.75), by Lewis L. Lorwin. He points out the confused motivation of such programs. The purpose may be relief, as it was during the depression, or vocational training and guidance. The program should be "geared both to a public works policy and to schemes for general social-economic development." For the author, the high purpose of such a program is the equalization of educational and economic opportunity for youth. He is concerned with the "purpose and character" of a works program for youth and how it "should be planned and carried out." He does not attempt an "analysis of the historical conditions which underlie current youth work programs." This is to be the subject of an early report by the American Youth Commission. Students of political science will be interested in the author's comments on the effectiveness of decentralized control in the administration of N.Y.A. (pp. 137–9). He thinks it was carried too far with N.Y.A. This is a well written and stimulating study of the aims and problems of programs for underprivileged youth. It belongs on the "must list" of educators, C.C.C. and N.Y.A. administrators, and all others interested in youth guidance or vocational education. William Healy and Benedict S. Alper consider the problems of criminal youth in their *Criminal Youth and the Borstal System* (Commonwealth Fund, pp. vi, 251, $1.50), a study of the system of treatment of youthful criminals in England. Borstal takes its name from the village near Rochester in England at which the first such institution was founded. The book is an analysis of the humane and intelligent system used for dealing with young criminals in England. The authors attempt not only to give a picture of the ten-odd institutions making up the Borstal system as it was at the outbreak of the present war, but also by critical comment on both the Borstal system and our American reformatories to lay down the main principles which should guide a humane and intelligent approach to the young criminal. Their two main criticisms of the Borstal system in England are its failure to employ psychiatry in dealing with abnormal cases, and the disadvantages of a commitment law which prevents holding any cases beyond four years of institutional and parole attention. To one interested in governmental policies, the most interesting part of the book is the analysis of the character of those who man the institutions. No uniformed guards; no guns; in some institutions, no gates or bars—testifying to the effectiveness of the recruitment policies followed by the Prison Commission in coöperation with the civil service. This is a thought-provoking study, and it offers sound guidance for improvement of our own state prisons and reformatories, beginning with improvement of personnel.—ROBERT W. MCCULLOCH.

In his *Sixty Years of Indian Affairs* (University of North Carolina Press, pp. 428, $5.00), George Dewey Harmon deals with the relationship between the United States and the Indian peoples within our expanding domain between the years 1789 and 1850. If it were not history, the study could be called the story of Uncle Sam's struggle with his conscience. The problems involved were not initially of the making of the administrations of President Washington and his successors, but were shaped in large part by the earlier activities of the British and French and Spanish and colonial governments, and were modified for many years by the continued activities of rival nations or their peoples upon the American continent. The government dealt with the Indians as sovereign, yet administered affairs as though they were wards; the government acknowledged the Indians as proprietors, yet felt free to push them from place to place and permit relentless white settlers to take their lands. With strange inconsistency, under solemn treaties the government protected not the Indians but the whites. Yet from the very beginning the government recognized the importance of educating and Christianizing the Indian people and of teaching them thrift and industry and the love of individual ownership of land. We wonder at the responsibility placed under the early treaties upon the undisciplined Indian peoples in the protection of their rights "to drive off the settler, or punish him in such manner as they shall see fit"; we wonder at the loose way in which monies were handled by the agents for the government for the purchase of gifts, supplying needs, etc., and with no adequate supervision from the Washington office. The book is well documented, splendidly supported by brief quotations and footnotes, and throughout is written in scholarly fashion.—BURTON L. FRENCH.

The Foreign Policy of Thomas F. Bayard, 1885–1897 (Fordham University Press, pp. 800, $5.00), by Charles C. Tansill, covers in great detail a very short but important period of American foreign relations, and for scholars in this field, Dr. Tansill's book is invaluable. In minute detail, the author covers many important questions of the time in our relations with Samoa, Great Britain, Canada, Mexico, and Germany. Extensive quotations from the voluminous Bayard Papers in the Library of Congress, as well as many other documentary sources of information, are used by Dr. Tansill to illustrate and prove his points. Because of the fact that Dr. Tansill has placed so much emphasis on even minor details of this inviting period of American history, his book is not easy to read. It is encyclopedic in nature. The author treats at some length Bayard's advocacy of close Anglo-American coöperation, and this definitely increases the interest in his book in the light of present-day foreign policy. That Bayard is a hero to Professor Tansill and that he is regarded as an outstanding American statesman too long neglected by our historians are made clear throughout the book. These facts do not, however, minimize the importance of Dr. Tansill's contribution to American history. Extensive documentation indicates the tremendous amount of material covered by the author in preparing the volume.—CARL M. FRASURE.

In his *Constitutional Government*, Woodrow Wilson describes senators as representing regions of the country. This description fits Henry Moore Teller, whose biography, *Henry Moore Teller, Defender of the West* (Caxton Press, pp. 401, $5.00), by Elmer Ellis, depicts territorial representation. When Teller was United States Senator from Colorado, that state was surrounded on all sides by territories. He became the voice of the entire area and an astute student of territorial problems. For more than thirty years, he served in Washington as senator and cabinet member. His life had in it something of the romance of the country. Born and reared in western New York, he lived in central Illinois from 1858 to 1861 and knew Lincoln as candidate for both senator and president. In 1861, he went to Colorado for a month, and he stayed the rest of his life. As a senator, he was a useful public servant. Although not a colorful figure, he was a man of integrity and ability. Like most frontiersmen, he was opposed to conservation, and like many citizens of Colorado, he favored free silver. As Secretary of the Interior, his knowledge of Indian affairs was at the disposal of the nation. The book is interesting, well documented, and nicely printed. —PAUL M. CUNCANNON.

Providing suitable supplementary reading materials for students in the introductory course in American government is a problem which college teachers face perennially. Often the available materials are discovered to be too advanced, too diversified, or too dull, and consequently few students make use of them. *The People, Politics, and the Politician* (Henry Holt and Co., pp. x, 1001, $3.25), by A. N. Christiansen and E. M. Kirkpatrick, is a collection of one hundred and twenty selections which is designed to meet this need. The topics are arranged to coincide with the order of treatment followed in those textbooks employing the so-called functional approach, but this should not prevent use of these readings in conjunction with textbooks based on the traditional "three level" plan. The selections, with very few exceptions, consist of articles or excerpts from lengthier writings. No mere accumulation of additional details and facts, they have evidently been chosen with the primary purpose of stimulating the student's interest in public affairs and of assisting him in formulating judgments upon controversial issues and problems. Explanatory notes given at the beginning of each chapter and an appended series of short biographical notes on the authors whose works are used should be helpful in enabling the reader to gain a proper perspective. While limitations on space have prevented presentation of completely rounded discussions on all topics treated, the choice of selections reveals a keen appreciation of the type of material which undergraduate students will find interesting and illuminating. Here is a book of readings which most of them will actually read.—JOSEPH E. KALLENBACH.

The Book of the States, 1941–1942 (Council of State Governments, pp. xii, 423, $3.50), like its predecessors, contains valuable information on state organization, personnel, legislative sessions, and the activities of the Council of State Governments in assisting states to solve their problems of legislation and administration, notably in connection with the national defense program, state trade barriers, and interstate coöperation. The tables included have increased in number to more than a hundred. Some of the newer ones give data on the assessed valuation of property, state and local debt behavior, ballot forms and voting qualifications, state defense agencies, legislative procedure, judicial tenure, and constitutional amendment procedure. In addition, brief articles give the "news" on recent developments in the field of social security, federal grants to the states, the merit system, judicial and legislative councils, declaratory judgments, and arbitration legislation. The volume closes with the usual bibliography and roster of state officers. The value of future editions will be enhanced if tables are included, giving (1) constitutional limitations upon the legislatures with respect to special, private, or local laws; (2) the number, names, and size of legislative committees; (3) the origins of recent constitution-amending proposals—(a) in constitutional conventions, (b) in legislative action, (c) in the popular initiative; and (4) proposed laws recently voted upon under the *statutory* initiative and referendum.—P. O. RAY.

The national defense program has affected various cities in different ways and has brought them new problems. Municipal officials and others interested in municipal problems of today will welcome *Cities and the National Defense Program* (American Municipal Association, pp. vi, 73, $1.00), by Arnold Miles and Roy H. Owsley. The first three chapters describe typical effects of the defense program on cities, and the fourth discusses "problems still largely unsolved" and indicates "desirable machinery for securing proper solutions." This bulletin is a follow-up of the American Municipal Association's bulletins, *The British Defense Program* *and Local Government*, published in 1940. Chapter I describes the early effects on cities of the selective draft and National Guard acts, alien registration, investigation of espionage and sabotage, and the organization of defense councils. Chapter II describes actions dependent on state leadership, actions taken on federal recommendation, and actions taken on local initiative. The third chapter presents the situation in regard to the "Defense-Connected City." In connection with these "boom" areas, the discussion centers around housing, airports, highways and traffic, public health, and law enforcement. The last chapter presents unsolved problems in the fields of finance, law enforcement, housing, personnel, planning, and the coördination of community facilities. Definite suggestions as to what the federal government, state governments, and cities should do are included in the kind of action required to bring some order in our complex governmental system now under stress of the all-out defense program. —KENNETH P. VINSEL.

Every professional student of politics must have had occasion frequently within the past decade to reflect upon both the number and quality of the researches and surveys on social and economic problems published by the United States Government and to feel grateful—when it proves impossible to secure them free—for the low prices which the Superintendent of Documents maintains. *Strikes in Defense Industries* (Government Printing Office, pp. vii, 299, $0.25) brings another such occasion. In this calm and tempered study, undertaken at the request of the chairman of the Senate Committee on Education and Labor by the Legislative Reference Service of the Library of Congress, eight members of its Defense Service Section have brought together the salient statistical facts about defense labor disputes, summarized national and state law on labor relations, described administrative agencies and procedures available for the settlement of controversies both now and in the first World War and both here and abroad, and finally indicated some of the factors in the economic and cultural significance of strikes. All this adds up to a convenient and authentic summary of "government in relation to labor" *au courant* as of May, 1941. There is a valuable catalogue of methods of industrial peace (pp. 13–16), and the reprint of the National Labor Relations Board's description of the notorious "Mohawk Valley Formula" (pp. 51–52) is useful. Skilful direction by Leifur Magnusson offsets whatever disadvantages may lie in plural authorship.—JOHN A. VIEG.

The Bureau of Government of the University of Michigan has published as its seventh study *Voting Behavior in a Metropolitan Area* (pp. 94, $0.50), by Edward H. Litchfield—a doctoral dissertation built upon the efforts of many individuals in addition to the author—and the Bureau is to be congratulated upon its contributions to the understanding of American politics in general and of Detroit politics in particular. The materials in the study point in one direction, but it is a direction in which the author was apparently reluctant to go. In his conclusion, he pays lip service to Holcombe's thesis about the rôle of the middle classes in softening class conflicts in the United States, but his fingers all point in the opposite direction. They show that there is an increasing class conflict in American politics. The middle classes are tending to side with the upper income groups in this struggle; and the upper income groups are becoming the most decided in their views. The public opinion polls for 1940 corroborate this. Regarding the methods of investigation used, several comments might be made. The relevant literature on the subject was not exhausted. The author failed to give sufficient background material so that the figures could take on meaning. This applies especially to the chapter on third parties. Correlational methods were avoided, apparently because of the amount of work involved; but with the new machine methods for calculating the coëfficients, this should be no obstacle. The author fails to indicate the changes that have taken place in absolute numbers of registered voters and persons voting. In other words, the reader cannot get the full significance of the figures without doing a little research of his own on Detroit politics. The methods employed to calculate where a precinct should be placed in the income classification are open to serious objections which could be removed by using the 1940 census tract data.—HAROLD F. GOSNELL.

Investigation of Concentration of Economic Power (United States Government Printing Office, pp. ix, 782) is the final report of the Temporary National Economic Committee created by Congress in 1938. Thirty-one volumes of hearings and forty-three research monographs preceded it. The committee's summary statement and recommendations comprise only forty-three pages, while a verbatim report of the public sessions to consider recommendations, a brief history of the committee, and numerous appendix materials make up the bulk of the volume. Concentration of economic power is held to be the foundation of political dictatorship, and therefore a danger to democracy. This does not require the abolition of large-scale collective enterprise, but the social and economic responsibilities of such enterprise need emphasis. Specific recommendations for congressional action are made in connection with patents, trade associations, corporate mergers, and insurance. General recommendations also are submitted, all emphasizing the importance of competition and the importance of encouraging private investment in new enterprises. The committee favors less participation in business by government, vigorous enforcement of the antitrust laws, removal of interstate trade barriers, repeal of price-fixing laws, and lower taxes on income from investments in new, independent businesses.—CHRISTIAN L. LARSEN.

Labor Cases and Materials (F. S. Crofts and Co., pp. xv, 674, $4.00), by Carl Raushenbush and Emanuel Steirs, is additional evidence that authors are recognizing that the subject of the relationship of government to labor can and should be treated as a unit for purposes of study. As its title indicates, the book is a collection of United States and state court cases, articles, statutes, and other documents dealing with various phases of the relationship between labor and government. One of the valuable features is a series of comments and explanations written by the authors at the beginning of the various chapters and sub-divisions of chapters, making this a combination of case-book and text-book. Oftentimes, attempts to combine textual and case material result in an unusable hodge-podge. In this book, however, the authors have been quite successful in combining the two types of material and developing a very usable and complete text. In fact, the only criticism which the reviewer has to offer is that the scope of the material is almost too comprehensive. If it be a fault, this is perhaps a happy one, since any person using the book has a wide choice of material from which to select and adapt to his needs and uses.—FORD P. HALL.

One corner of the fiscal problems that arise in war and preparation for war is explored in *National Defense and State Finance* (Bureau of Public Administration, University of Alabama, pp. v., 180)—a series of eleven papers presented at a Southwide conference at the University of Alabama to consider the problems indicated in the title. Two papers survey the experience of Canada and Australia, two cover that of the United States in the first World War, one recounts the spending program of 1933–40, one prophesies with reference to the current national defense program, four consider the state problems of budgets, services, revenues, and the future, and finally there is a treatment of the economic effects of the defense program on the South. The papers are excellent reports on the topics considered. The few pages allotted to each have been fully utilized to present the important data, with expert generalizations based on that data. The men chosen to present these papers are experts on the topics discussed. None of them is sanguine, and their papers indicate fully why they are not.—CHARLES B. HAGAN.

North Carolina Boundary Disputes Involving her Southern Lines (University of North Carolina Press, pp. 250, $1.25), by Dr. Marvin Skaggs, is Volume 25, No. 1, in the James Sprunt Studies in History and Political Science published under the direction of the departments of history and political science of the University of North Carolina. Dr. Skaggs has carefully utilized all the mechanics of scholarship, multitudinous footnotes, voluminous bibliography, and a complete index to a rather small and specialized subject. He justifies his interest in boundary disputes somewhat pretentiously: "Such important questions as security of territory, the rights of states, peace and war, economic welfare, right of settlement, national politics, national expansion, international relations, and even the existence of the states and the Union, were involved." He has concentrated his study on the disputes between the Carolinas and between North Carolina and Georgia, disputes noteworthy for their length and complications; and all of them he treats with meticulous detail. Dr. Skaggs has worked largely with primary sources, including much manuscript material, and the Southern historian will find in his book much interesting and hitherto unpublished information.—Marian D. Irish.

In *The Clarks; An American Phenomenon* (Silver Bow Press, pp. 257, $2.50), William D. Mangam tells the sordid story of William Andrews Clark, mine-owner, senator, multi-millionaire. "The richest man in Montana he had wanted to be, and he became one of the richest men in America. He wanted to be a senator and as a senator he is known. . . . When he died he was called a king by reason of his wealth and power. . . . But no great friendship ever came to him" (p. 93). Born in 1839, Clark profited from the Western copper mines. When he died, in 1925, he left a fortune of $200,000,000. The political scientist will find a dramatic case study in the first chapter, with its description of Clark's conquests in Montana and the account of his corrupt election to the United States Senate. In the following chapters, which rehearse the tale of his *amours* and the life history of each of his four children, there is a sickening, disgusting recital of disgraceful dishonesty and depravity. Yet Professor Edward A. Ross says, in an Introduction: "It is a priceless social document. It may be that the author's cool matter-of-fact setting forth of the most damaging truths may launch a new model of biography, viz., *social* biography."—Mona Fletcher.

FOREIGN GOVERNMENT AND POLITICS

The German administration of criminal justice, which in no way can be compared with any Anglo-Saxonian court system, is one of the most interesting phenomena of modern political science. It took a decisive part in the development of the National Socialist régime, and at the present time it is one of its most important administrative wheels. Two classical books, written by eminent journalists, cover the functioning of criminal justice in the German Empire and in the Weimar Republic: Maximilian Harden, *Prozesse* (1913), and Sling, *Richter und Gerichtete* (1929). Now, we are fortunate enough to be also in possession of a fascinating and comprehensive description of Nazi criminal justice until 1939: *Skeleton of Justice* (E. P. Dutton and Co., pp. 346, $3.00), by Edith Roper and Clara Leiser. The strength of the book lies in the fact that Edith Roper, in her capacity as a court reporter in Hitler's Germany, gives an unemotional and accurate account of crime cases and their administrative handling by the "legal" officers. The "cold method" of backing militarism and bureaucracy by court decisions, applied by the judges of Wilhelm II and of the Weimar Republic, is transformed today in the open terror executed in the interest of the Nazi system by the "legal" officials. They are not judges, but a kind of higher police officials administering political reactions, religious feelings, currency restrictions, sex relations, as well as the general public safety. And all this is done in the name of the Fuehrer, who claims to be the "Supreme Judge of Germany." The cases described and analyzed by Miss Roper reveal that this administration of justice by summary procedure is nothing else than the expression of the totalitarian police régime. Analyzing her exposition, together with some statistical material collected by the reviewer, one finds that the results of the system are very poor even from the viewpoint of its initiators. The increase of political crimes, of sex crimes, and of juvenile gangsterism in Hitler's Reich are significant. The material contributed by Miss Roper, together with its organization and interpretation by Miss Leiser, make *Skeleton of Justice* a genuine contribution in the field of totalitarian judicial methods.—ROBERT M. W. KEMPNER.

Week by week and hour by hour, the extant democracies are adapting their public policies to the exigencies of a world at war. Not only do central governments face this challenge, but local administration must adapt itself as well in order to survive. James L. Sundquist prepared for the American Municipal Association a report on *British Cities at War* (Public Administration Service, No. 76, pp. vi, 110, $1.00) by digesting, compiling, and excerpting from current English periodicals. It covers those months of intensified hostilities from about July, 1940, to May, 1941, when all-out German raids showered bombs on focal British centers of industry, commerce, history, and culture. Without attempting to dramatize this thunder and lightning air war, the survey indicates systematically the manifold adjustments undertaken to cope with the crucial circumstances in local administration and in central-local relations. The most careful prewar plans proved under fire to be superfluous in some respects and wholly inadequate in others. So the English people proceeded characteristically without any five- or ten-year schemes for "the duration," but on a pragmatic policy of adjusting local services to the demands of the moment. For example, the extensive preparations for gas attacks and the organization of decontamination squads were not called into operation during this phase. The rain of fire bombs, however, precipitated the most drastic single reorganization. Some 1,400 fire departments in Great Britain were nationalized. Lack of big, mobile fire brigades and insufficiency of mutual-aid plans led to centralization. Fourteen regional commissioners were placed in charge of integrating civil defense on the home front and stood in a unique capacity mid-way between central and local levels of government. The central government removed from local units any responsibility for care of the aged, and assumed virtually all of the new burden of relieving distress arising directly or indirectly from the war. Grant-in-aid policies turned upwards. The list of enterprises for which the national government announced one hundred per cent grants was expanded to include certain types of A.R.P. expenditure, including shelters, removal of debris, salvage of personal property, evacuation, and salaries for full-time civil defense workers. All these emergency measures are described in this brochure, as well as the organization of volunteers, black-outs, air raid incident services, relief of injured, repair of homes, salvage, even municipal farming and restaurants. Nor is the impact of the war on normal municipal functions overlooked. Mr. Sundquist has performed a real service in bringing these materials together in a well-organized monograph.—A. W. BROMAGE.

B. K. Long's *Drummond Chaplin* (Oxford University Press, pp. vi, 373, $5.50) is the biography of an Englishman who devoted his life to furthering imperialistic enterprises which Cecil Rhodes had opened up in Southern Africa. Among these projects was unification of British colonies and Boer republics in South Africa under the British flag. Drummond Chaplin, who as Joint Manager of Gold Fields, Consolidated, had been active in Transvaal politics after the Boer War, was an outstanding supporter of Jameson, leader of the Unionist Opposition in the first sessions of the Union House of Assembly. In 1914, Chaplin severed his business and political connections in the Union to become Administrator of Southern Rhodesia during its period of transition from a possession of the British South Africa Company to a crown colony. After the electorate of Southern Rhodesia voted in 1923 for responsible government in preference to incorporation in the Union, Chaplin returned to South Africa. As a South African party follower of General Smuts, he sat in the House from 1924 to 1929, when he failed to secure renomination. British imperialism in Southern Africa is depicted by the author in a highly flattering light. Chaplin was uncompromisingly in favor of maintaining a preponderant British influence there, and had hoped Southern Rhodesia would serve that cause by entering the Union. Although Sir Drummond will be remembered as an administrator rather than as a political leader, the book is of interest to the political scientist chiefly for the author's analysis of South African politics at the formation of the Union. Material included from Chaplin's files would have been of greater value to the student of British imperialism had it dealt less with personal matters and more extensively with Chaplin's rise to prominence in the mining industry (under the sponsorship of Rhodes just prior to his death), and with his subsequent public service. A table of contents would have made the volume more useful.—LUCRETIA L. ILSLEY.

Canada Fights; An American Democracy at War (Farrar and Rinehart, pp. vi, 274, $2.00), edited by John W. Dafoe, is a book written for American consumption, describing the rôle of Canada both in the European war and in the defense of the northern half of the Western Hemisphere. It is the joint work of a group of Canadians (five journalists and a professor), under the editorship of the eminent journalist, J. W. Dafoe. The spirit of the book is broadly Liberal, in the party sense, and North American. It is avowedly propagandist, in the sense of seeking to inform the American public of Canada's rôle and of putting this in the best light possible, while admitting the occasional home truth. It is deliberately popular in character, but contains much that is of interest to the specialist concerning war economics (Chapter 4) and North American joint defense (Chapters 7, 8). "What Is Canada" (Chapter 2) adds nothing to recent literature on Canada by Siegfried, F. R. Scott, and MacKay and Rogers. Chapter 3—"Why Canada Is at War"—exaggerates the clarity of purpose among Canadians at war and overestimates the importance of Canada's own initiative in declaring war. Those interested in the ideological side of war policy will be somewhat disappointed with Chapter 6 ("Maintaining the Front at Home"), which tends to be politically partisan in defending the present government and conveys a totally wrong impression concerning the state of civil liberty in Canada, and with Chapter 9 ("Canada and the Post-War Period"), which somewhat vaguely favors "the general idea of a universal association of regional groupings."—H. G. SKILLING.

The subject of Orwell de R. Foenander's *Solving Labour Problems in Australia* (Melbourne University Press, pp. xxxv, 168, 15s) is much narrower than the title indicates. The book continues the study of the Commonwealth Court of Conciliation and Arbitration which the author began in his earlier volume, *Towards Industrial Peace in Australia*, and concentrates upon the experience of the past four years. The emphasis is upon detailed analysis of wage and hour awards in various fields, with little general consideration of the effectiveness of the system in preserving industrial peace. However, two chapters are devoted to the relative failure of the Court in dealing with the coal industry. Changes in the Court's machinery and powers due to war-time exigencies are noted. The relationship between the federal Court and the various state industrial tribunals has also become of increasing importance under war conditions, and efforts are being made to prevent this dualism of authority from blocking effective control. No attempt is made to compare the judicial approach of the Australian system with the administrative process of, say, the Fair Labor Standards Act. But there is a surprising statement to the effect that the N.R.A. was set up in imitation of the Commonwealth Court.—C. HERMAN PRITCHETT.

The *Indicador da organização administrativa do executiva federal* (pp. 569) issued by the Departmento Administrativo do Serviço Publica of Brazil in 1940 furnished for the first time a directory of all agencies of the federal government of Brazil functioning at the time of compilation. At the beginning is listed the president of the Republic with the agencies operating immediately under his direction. Then follow the ministries in alphabetical order, each accompanied by the agencies subordinate. Under each agency is given a reference to the basic laws or decrees establishing the organization, the chief officer (in the case of commissions the membership), and the address. The publication presents for the first time in all of Latin America an attempt at a comprehensive government directory, making it possible for one to secure a quick, detailed, and accurate picture of the national administrative structure.—J. B. CHILDS.

INTERNATIONAL LAW AND RELATIONS

Both in terms of United States policy toward the present world war and in terms of the organization of peace at its conclusion, Cleona Lewis' *Nazi Europe and World Trade* (Brookings Institution, pp. xi, 200, $2.00) is packed full of important data. It is an effort to analyze the trade situation which will exist at the end of the war if Germany dominates all of continental Europe west of Russia. All discussions of American policy toward the war and of the consequences of a German victory involve sooner or later a consideration of the extent of economic power which Germany would be able to wield in international trade under such circumstances. Without attempting to predict the outcome of the war, Miss Lewis seeks to examine, on the basis of the trade figures of 1929 and 1937, just what *would* be the German position *if* the Nazis were to win. The study consists of an examination of the degree of dependence of the Nazi-dominated area upon outside sources for basic consumptive requirements and the extent of control which it might be expected to exercise in international trade because of its position with regard to exports. The author concludes that the Nazi area would have to continue to import large quantities of food and raw materials, that there would continue to be a substantial gap between the required imports and the possible exports, and that there would probably be a shrinkage of income from services from which might result a real weakening of the economic power of the Nazis over world trade as a whole. In reaching these conclusions, Miss Lewis deliberately does not attempt to estimate the effects of either the war itself or the post-war reconstruction period upon the Nazi productive system; nor does she take into consideration the possible effects upon import requirements of changes in the standard of living. The author has very carefully circumscribed the scope of her study, and it is important therefore that no unwarranted deductions be drawn from her conclusions. Thus, while she concludes in effect that the gap between imports and exports would make it difficult for Nazi Europe to dominate world trade, a realistic view of the probable total international situation under such circumstances should not encourage great hopes of exercising effective control over the Nazis by means of trade. Should the Nazis dominate western Europe, it may be presumed that the Nazi war machine and party hierarchy will still be intact. That would mean that arbitrary control over living standards would be complete and Germany's bargaining position strengthened by limiting imports. It would mean further that unless there took place a general unification of the rest of the world for purposes of bargaining with the Nazis, individual countries would be confronted with all the elements of the totalitarian "trading" tactics recently experienced by the Balkan states. While in the long run the trade position of a Nazified western Europe might be none too independent, the short run realities might be sufficiently disagreeable to make the long run of merely academic interest!—WALTER H. C. LAVES.

Frederick L. Schuman, whose predictions in 1937 of approaching events in the realm of world politics were fully realized, today refuses to predict the outcome of the present war. Instead, in the third edition of his *International Politics* (McGraw-Hill Book Co., pp. 733, $4.00), he states simply that "victory will go to those with most courage, endurance, and imagination." The author takes it for granted that "one or the other of the contestants for hegemony will unify the world before it has grown much older." If the victors or their followers fail to do so, we may look forward to the third world war of the century. Urging a redoubling of energy in the democratic states so that they will not be vanquished by default, the author warns that no revival of the League of Nations is likely to prove workable as a basis of order. Instead, he strongly supports Clarence Streit's proposals for a federal union, beginning with the United States and the British Commonwealth of Nations, with a common currency, a common commercial régime, and a common force for defense. National sovereignty, a primary evil in this day of finance capitalism, can be abolished in no other way. The sixteen chapters of the second edition of this book have been reduced to thirteen, while the text is shorter by some fifty pages. Much of the material from Book III ("International Anarchy") has been rearranged and condensed; some of the chapters have been almost entirely rewritten. But the main feature of this section is a new chapter entitled "The Retreat of the Vanquished," whose one hundred pages bring up to date the rapidly shifting diplomatic and military aspects of the war. Books I, II, and IV have also undergone the revision required by the course of present-day events. This edition retains all the fire, interest, and food for thought of its predecessor. It is indispensable to teachers of international affairs, although Schuman warns that its value as a guide to the future will persist "only if the legions of Fascist totalitarianism are vanquished."—VERNON A. O'ROURKE.

In 1936, Hans Heymann came to America from Germany, where his distinguished career of scholarship had been interrupted by the extremes of Hitlerism. From his knowledge of Old World conditions, and his enthusiasm for a genuine New Order throughout the world at large, arises the *Plan for Permanent Peace* (Harper and Brothers, pp. xx, 315, $3.50). The emphasis is placed upon a reconstruction of our economic world order so as to control one of the primary causes of war, but with full realization of the importance of political and cultural influences. A Bank of Nations, with regional auxiliary institutions, should (1) issue an international medium of exchange, (2) extend short-term credits to trade, and (3) create promissory notes for long-term investment purposes. "Fourteen ideals of a living peace" are enumerated (pp. 85–87), to be effectuated by a practical mechanism instead of relying upon the good intentions or good faith of peoples and governments. Not the elimination of free competition, but coöperative action according to a plan in which all nations must be included, is the solution offered. In addition to the basic economic organism to be built, there should be a reorganized international labor office and an international planning board for social balance and a federal world authority of a political nature. Dr. Heymann believes that "if an efficient organization adequate to our human wants can be visualized, our better impulses will assert themselves and strive for the attainment of such a superior organization" (p. 233). In support of his confidence, he quotes passages from recent statements of Neville Chamberlain, C. R. Atlee, Harold J. Laski, Richard T. Ely, the Commission to Study the Organization of Peace, and Pope Pius XIII (pp. 237–257). Although many may doubt the workability of his plan, none can challenge the author's sincerity and zeal in urging that "this higher world order is no dream, no utopia, but a relatively simple and logical aim." All interested in the promotion of world peace through some form of international federation will welcome Julia E. Johnson's *International Federation of Democracies* (The Reference

Shelf, Vol. 14, No. 8, H. W. Wilson Co., pp. 262, $1.25), a compilation of concepts expressed by over fifty individuals and organizations during the past decade. The volume is primarily a debaters' manual, with the customary summarization of arguments on pages 221–237 and a convenient bibliography embracing twenty-five pages.—WILSON LEON GODSHALL.

The thesis of Secretary Hull that international anarchy is the product of disrespect for international law is converted into its antithesis by Jackson H. Ralston in his *A Quest for International Order* (John Byrne and Co., pp. 205, $2.00). To him, the blame for international disorder lies largely in international law as conventionally understood. Mr. Ralston's reputation in the practice and scholarship of judicial settlement makes the more startling his contention that even this field is largely vitiated by the intrusion of international law. He criticizes it on the ground that, unlike municipal law, it does not harmonize with the equity once called the law of nature, but rather confuses right with event or custom. Mr. Ralston spares the natural-law school no less than the positivists, however, in deploring the fact that the unit of international law has invariably been the state rather than the individual and his welfare. These defects of international law are related by him to its toleration, not only of the doctrine of absolute sovereignty, but also of the sinful deeds of the sovereign state—war, intervention, and trade barriers. Were order and justice among individuals its only criteria, international law would, according to Mr. Ralston, point the way to a world federation featured by an international parliament and court, a subordination of national sovereignty to the general welfare, and an avoidance of all coercion except economic sanctions. That this would be a consummation devoutly to be wished one might well concede. But to put any blame for the delay of the millennium upon international law seems equivalent to blaming a photograph, or those believing a modicum of virtue to be better than none.—ALBERT K. WEINBERG.

Every discussion of the Sino-Japanese conflict inevitably reaches the question, "How can Japanese economy stand the strain of the war?" In *Japan's Economy Under War Strain* (Chinese Council for Economic Research, pp. 68), steps toward an answer are taken by trying to show what has happened thus far. Using figures and data from Japanese sources for the most part, or from estimates based upon Japanese studies, the compilers of this publication have brought together some very interesting information. While complete accuracy is not possible, the study seems to err on the conservative side. Four chapters on "The General Picture of the War Burden," "Financial and Monetary Aspects," "Supply of Goods," and "Labor and the War" are self-explanatory and merely strengthen widespread opinion as to the growing economic strain in Japan. Figures in the chapter on labor which point out the increasing use of child labor in place of adults, and a striking growth in accidents due to longer working hours, are particularly significant. In the sections indicating the extent of American aid to Japan, the compilers have shown commendable restraint in not laboring the point, but in merely giving the figures and letting the reader's conscience do the rest. After reading the study, one cannot help conceding the validity of the compilers statement: "In any event, the Japanese people are yet to see the worst."—ANDREW E. NUQUIST.

The Treaty of Washington, 1871 (Cornell University Press, pp. xiii, 134), by Goldwin Smith, is a study in the imperial relations between Canada and Great Britain. It deals only incidentally with the British-American facets of the famous treaty of 1871, but gives a full and interesting account of the long struggle within the British delegation between Canadian Premier Sir John A. Macdonald and his British colleagues. The storm in Canada over ratification is told equally well. The volume amply demonstrates that in its very infancy the Dominion of Canada laid the basis for its present independence in foreign affairs. The volume is a well documented addition to Canadian-Imperial history.—D. F. FLEMING.

What Stuart Chase has done for the popularization of economics is done for the popularization of the political science of Latin America by Hubert Herring in his *Good Neighbors* (Yale University Press, pp. 260). The author has buried deep facts in a lyrical, literary style which does as much to transmit the spirit of his subject as cold, hard statistics would ever have done. The statistics are there, to be sure, but they are not painfully there the way college professors generally prefer them. This is not a text-book. It is much more the "best seller" type. To those who have been over and over the ground of Latin-American relations, it does not offer much that is new except a different integration and many interesting personal accents. But those who are meeting Latin America for the first time could not find a more felicitous introduction. A word of praise needs to be said for the unusual pen and ink maps which underpin the over-all picture so well. Since cultural relations is Mr. Herring's special province, it is not surprising that he should have sustained his fine reputation in this field.—FRANCES REINHOLD FUSSELL.

POLITICAL THEORY AND MISCELLANEOUS

Seba Eldridge's *New Social Horizons* (D. Appleton-Century Co., pp. x, 444, $4.00) and Robert E. Riegel and others' *An Introduction to the Social Sciences* (D. Appleton-Century Co., pp. xxvi, 554, xxviii in Vol. I, and xxvi, 555–1110, xxviii in Vol. II, $6.50) apply cross-fertilization to the social sciences so as to achieve a more nearly adequate understanding of and control over social phenomena. Professor Eldridge demonstrates the catholicity of his sociology by utilizing materials ordinarily preëmpted by economists, psychologists, and political scientists. On his new social horizons appears a modern Utopia, after analyses reveal undesirable features in the present distribution of purchasing power, in the organization of production and disorganization of consumers, and in our political institutions. He sees the need for "a much larger measure of collective responsibility and control" and warns against "relegation of the state to a subordinate place in the social order, just at the time growing economic interdependence was accentuating needs no other institution could serve." He emphasizes the individual citizen's responsibility for developing political democracy, since "popular government means *lay control* in public affairs." "We must learn how to socialize economic enterprise, build a responsible state, foster competent laymanship, create a creative people." That the new social horizons are not mirages is evidenced by carefully documented facts concerning collectivist developments in twelve major fields in the United States. Quantitatively greater, but more elementary, is the two-volume "Introduction" by Professor Riegel and seven colleagues of the Dartmouth faculty. Since the course in which these volumes developed was primarily for sophomores who did not plan to major in the social sciences, its description of current social institutions and their problems includes various phases of economic activity, of the family, population, and race, of crime, and finally of government and politics in a democracy. Selecting and arranging materials, not easy in one division of one social science, become increasingly difficult when all the social sciences are "integrated." Government control of business is the subject in Part IV, while government itself is not studied until Part XIII of the fourteen parts into which the two volumes are divided. The explanation offered is that "democratic government is the meeting place of the tremendous variety of forces which constitute modern society and consequently can be understood only as those forces are understood." While recognizing the departmental prejudices which the organization of such a course encounters and the difficulties of fitting together the pieces of the puzzle supplied by the collaborators, the reviewer believes that too much material of interest only to specialists has been included and that consequently there has been too little of the integration which should make the book appeal to non-specialists.—Howard White.

James Burnham's *The Managerial Revolution* (John Day, pp. 285, $2.50) endeavors to show that we are moving rapidly in the direction of a political order dominated by what he calls "the managers." Capitalists, who have hitherto controlled both the economic and political spheres, have been on the way out for some time; and whether they know it or not, the "managers," in whom power over production is being increasingly vested, are, by that token, seizing control of the state. With this control will go the privileges of any ruling class, including manipulation of in-comes in favor of the rulers. That democratic socialism is imminent finds no support whatever in contemporary evidence; and the same statement can be made regarding the contention that "capitalist democracy" will survive. "The managers" see the fallacies of traditional shibboleths (as in Germany and the Soviet Union), cut through the red tape of parliamentarianism and capitalist dogma, abolish unemployment, and give the masses a sense of security for which they have been groping, but which the capitalist-parliamentary state was unable to provide. To this reviewer, Burnham's thesis can be criticized on three grounds: (1) the uncritical acceptance of the dogma that those who "control production"—whatever that may mean—*ipso facto* control the state; (2) ambiguity in defining "the managers"; and (3) absence of sufficient clarity and detail in marshalling evidence supporting the thesis.—MULFORD Q. SIBLEY.

In his *Not by Arms Alone* (Harvard University Press, pp. 161, $4.00), Professor Hans Kohn has collected six published essays on the current scene and its background. "The Totalitarian Philosophy" is an excellent exposition of the fascist exaltation of war as the permanent business of life. "The Problem of Central Europe" portrays Austria as the creator of a better German civilization, one modified by the other Hapsburg peoples, which should have evolved into a true federal union. Instead, Seipel, Dollfuss, and Schuschnigg aimed to forestall total fascism with a mild, clerical brand and were submerged. The section on "Czech Democracy" develops the rôle of the Czech historian Palacký in building a democratic tradition on John Huss, one which was to survive by superior moral and intellectual achievements, and which distinctly impressed Europe as well as the Czech people. Consequently, in suppressing the Czechs the Germans deliberately dealt "a decisive blow to world democracy." In later chapters, Kohn brings out the fears of the wealthy classes as the key to appeasement and warns that a "democratic revolution" will be necessary to defeat the world revolution of the fascists. He appeals for a vigorous and simplified education which will stress positive democracy, and democratic federation, as the antidotes for the brutal and regressive unifications of fascism.—D. F. FLEMING.

The Political Life of the American Medical Association (Harvard University Press, pp. 182), by Oliver Garceau, is devoted to the thesis that the internal processes of voluntary associations interested in public policy deserve a more careful examination than has customarily been made in studies of pressure groups and pressure politics. Obviously, a better subject than the American Medical Association for the scrutiny of "internal group government" would be hard to find. Of special interest to students of politics are the ingenious efforts of the author to discover the *locus* of power in the A. M. A. and his account of the techniques used by an "active minority" to suppress dissent within the profession in order to maintain a specious unanimity in the face of public criticism. The materials turned up are so illuminating at a number of points that it is to be hoped that this study will be followed by others of a like character. In view of the judicious treatment of the evidence throughout the volume, the author's strictures on the policy of the A. M. A. are very damaging, although the reader may question his conclusion that the remedy for the evils of indifference and oligarchy is the organization of parties within the membership.—E. E. SCHATTSCHNEIDER.

In *The Way Out* (International Publishers, pp. 255, $1.75), Earl Browder has brought together a group of his speeches, reports, and articles in an endeavor to show the Communist position in the contemporary world. Part I., "The Road to Peace," analyzes the American Communist position with reference to the war. Part II., "The Most Peculiar Election," deals largely with the issues of the 1940 election. In it Browder examines Republican, Democratic, and Socialist positions and finds them essentially alike. He unequivocally asserts that "Willkie was chosen for the Republican party by Roosevelt and Lamont after an agreement had been reached as to fundamental policy to which all would adhere . . . " (p. 89). Part III., "The Way Out of the Imperialist War," is a general discussion of foreign policy from the Communist point of view. Only "proletarian internationalism," Mr. Browder asserts, will constitute a solution to the problems of international relations; and he identifies this ideal with certain tendencies implicit in "the American tradition." This book will not add to Mr. Browder's reputation as a political thinker.—MULFORD Q. SIBLEY.

Public Administration Libraries, by a committee of the Social Science Group of the Special Libraries Association (Public Administration Service, pp. 77, $1.50) is, as its subtitle indicates, "a manual of practice." the several types of public administration libraries are described, together with their purposes and principal problems. The librarian is told how to select, acquire, classify, catalog, shelve, preserve, loan, "weed out," and replace his materials; how to select, compensate, and keep up the morale of his staff; how to plan and supervise the work of his agency; how to prepare and administer his budget; and is given a list of basic sources of information, the names and addresses of publishers of essential materials, and of the manufacturers of library equipment. The authors are librarians whose competence is unquestioned, and the value of much of the information presented is obvious. It is not very enlightening, however, to be told that a public administration library should have a typewriter with universal keyboard and library characters, that sloping dictionary stands are preferable to flat ones, and that cheap filing cases are not economical.—ROGER V. SHUMATE.

RECENT PUBLICATIONS OF POLITICAL INTEREST BOOKS AND PERIODICALS

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AMERICAN GOVERNMENT AND PUBLIC LAW

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